

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,
Appellant/Cross-Respondent,

vs.

AMERICAN BROADCASTING
COMPANIES, INC.; THE
ASSOCIATED PRESS; CABLE
NEWS NETWORK, INC.;
CHESAPEAKE MEDIA I, LLC,
D/B/A KSNV-TV; LOS ANGELES
TIMES COMMUNICATIONS, LLC;
THE NEW YORK TIMES
COMPANY; SCRIPPS
BROADCASTING HOLDINGS,
LLC D/B/A KTNV-TV; AND WP
COMPANY LLC D/B/A THE
WASHINGTON POST,
Respondents,

LAS VEGAS REVIEW-JOURNAL,
Respondent/Cross-Appellant.

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CASE NO.: 75518

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**RESPONDENT/CROSS-APPELLANT'S RESPONSE TO
APPELLANT/CROSS-RESPONDENT'S EMERGENCY MOTION FOR
STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING
PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Respondent/Cross-Appellant the Las Vegas Review-Journal is a Delaware corporation registered in the State of Nevada as a foreign corporation. The Las Vegas Review-Journal does not have any parent company, and no publicly held corporation owns ten percent or more of the Las Vegas Review-Journal's stock.

The law firm whose partners or associates have or are expected to appear for the Las Vegas Review-Journal is MCLETCHIE SHELL, LLC.

DATED this the 24th day of April, 2018.

/s/ Margaret A. McLetchie

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION¹

Despite the fact that almost six months has passed, the Las Vegas Metropolitan Police Department (“Metro”) has refused to produce a single public record about 1 October. Metro has thwarted access to each and every record the Petitioners have sought—including 911 calls and body cam footage—despite the many questions the public still has and the dogged efforts of the media to utilize the Nevada Public Records Act (the “NPRA”) to get answers. In contrast, the 911 calls from the February 14, 2018 Parkland shooting were released over a month ago.²

Even after the Review-Journal and other media outlets (the “Petitioners”) filed suit under the NPRA, Metro still failed to produce a single record.³ This is at odds with the NPRA, a robust public records law heavily weighted in favor of access in order to promote transparency. Metro has also never bothered to support its ongoing withholding of every document requested by Petitioners about 1 October. Instead, Metro has acted as if it is exempt from the NPRA. At best, Metro asserted blanket confidentiality claims. Now, in its “Emergency” Motion for Stay (the “Motion” or

¹ The Review-Journal addresses facts and procedural history throughout the brief.

² See <https://www.nytimes.com/2018/03/08/us/florida-school-shooting-911-calls.html> (last accessed April 23, 2018).

³ While it is true (and appreciated) that Metro has held press conferences and issued a preliminary investigative report about 1 October, what the NPRA addresses—and what promotes public trust—is *access to the public records themselves*.

“Mot.”), the only confidentiality claim Metro asserts is that production of records would jeopardize its investigative techniques. (*See, e.g.,* Mot., pp. 2, 3, 9.) This claim is entirely inapplicable to almost all the records at issue—including the 911 calls and dispatch logs (the “911 Records”). Indeed, Metro never asserted in district court that the claim applied to any records other than body cam footage (“Body Cam Records”),⁴ and has never provided *evidence* that the claim applies to Body Cam Records, let alone that it outweighs the presumption of access. As detailed below, the ongoing investigation Metro previously relied on to justify withholding every 1 October record was a very peripheral one pertaining to a man who sold some weapons to the shooter. It is just not possible that every withheld record relates to that investigation, let alone jeopardizes it. Metro’s case is a house of cards.

Thus, Metro cannot possibly meet this Court’s test for a stay pursuant to NRAP 8. Without any valid claim of confidentiality, Metro’s core dispute is not with the order mandating disclosure of records (the “Disclosure Order,” Ex. 1 to Mot.), and Metro cannot justify a stay of that order. Metro has also appealed the order governing fees and costs (the “Costs Order,” Ex. 2 to Mot.).⁵ However, a dispute

⁴ While the Review-Journal did not initially seek body cam footage, it has joined in the other Petitioners’ fight to obtain access (*See* Ex. E (Transcript (“Tr.”) of 2/7/18 Hearing (“Hrng.”) on petitions), p. 6:4-6), and has also offered in court to inspect body-cam footage in person.

⁵ It has long been apparent that Metro’s main gripe is this Cost Order. In its OST Motion, its central argument in favor a stay was: “Very simply, if the status quo is not maintained, LVMPD will be compelled to begin production of the records no

over money cannot justify a stay delaying further access to public records. With regard to the first factor set forth in NRAP 8(c), which governs stays, the purpose of Metro’s appeal will not be defeated (NRAP 8(c)(1)): if it prevails, Metro will get additional fees, and having to wait for funds is not irreparable harm (NRAP 8(c)(2)).

It is in fact the Review-Journal’s purpose in seeking records and filing suit pursuant to its NPRA rights that will be defeated if a stay is granted—and it is also the Review-Journal that faces irreparable harm (NRAP 8(c)(3)). The Review-Journal filed suit to obtain prompt access to newsworthy information so it could report to the Las Vegas community about the biggest mass shooting in its history. Transparency—which necessarily encompasses swift access to records—is more important, not less, in the wake of a mass tragedy.⁶ Further, the Review-Journal faces irreparable harm each and every day its ability to report on newsworthy public records and events is hampered.⁷ The relative harms heavily weigh against a stay.

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later than April 27, 2018 without appropriate payment for the extraordinary use of its personnel...” (Mot., Ex. 3., p. 7:10-12.)

⁶ See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (“When a shocking crime occurs, a community reaction of outrage and public protest often follows. ... Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.”) (citation omitted).

⁷ See, e.g., *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (“even a one to two day delay [in access to court records] impermissibly burdens the First Amendment”).

Fourth and finally, Metro is not “likely to prevail on the merits in the appeal.” (NRAP 8(c)(4)). Metro does not even attempt to establish that it is likely to succeed on the merits. Instead, it makes a vague argument that its appeal presents “significant legal issues.” While Metro casts the issues it raises as novel, the law as to the application of the NPRA is clear and does not allow Metro to withhold records or demand excessive fees before allowing access. Further, while Metro’s Motion suggests otherwise, merely presenting a legal question on appeal does not merit a stay. Instead, Metro must ““present a *substantial case on the merits* when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.”” *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (emphasis added). Metro cannot meet this burden because there is no valid claim of confidentiality at stake and a stay is not warranted in light of the mandates of the NPRA—facilitating transparency to promote democracy.

Not only does Metro fail to establish that a stay is merited, it fails to justify obtaining relief on an emergency basis. Any “emergency” now at hand is entirely of Metro’s own making. In denying’s Metro’s initial motion to stay (the “OST Motion,” Ex. 3 to Mot.), the district court observed this and recognized Metro’s “gamesmanship.” (Ex. I (4/10 Hrng. Tr.), pp. 16:16-17; p. 20:7-12.⁸) Metro sought

⁸ The Court explained: “... I’m very frustrated because I think that’s gamesmanship

reassignment of the case and filed a motion for reconsideration and motion for a stay (the “Initial Motion,” Ex. F.). At a status check on March 22, 2018, the newly-assigned judge directed Metro to supplement the motion and support withholding. (Ex. 8 to Mot., p. 2:14-16 of order; *see also* Ex. G (3/22 Hrng. Tr.), pp. 5:19-6:15 (district court stating that Metro needed to submit supplemental briefing because of the paucity of specifics in its Initial Motion).) Significantly, at that juncture, the district court granted a temporary stay until April 27. (Ex. 8 to Mot. (4/13/18 Order), p. 3:1-3 of Order.) Then, rather than justify its disobedience to the NPRA, Metro abandoned the Initial Motion, appealed, and filed the OST Motion. The district court thus noted that “at this juncture you are creating the emergency, Metro itself is, not the Court or the Court’s orders.” (Ex. I (4/10 Hrng. Tr.), p. 16:7.)

Even after being called to task by the district court for its dilatory behavior, Metro has not stopped its gamesmanship. On April 10, the district court announced its decision to deny the stay and made clear it was dissolving the temporary stay it had granted (*id.*, p. 28:3-8) and specifically advised Metro of its ability to seek a stay from this Court. (*Id.*, p. 25:13-14.)⁹ Yet, Metro—which has stables of attorneys and

that’s going on here. All of this could have been done months ago. I mean, it’s now months since the shooting occurred, and it’s still the same delay, delay, delay. When one technique doesn’t work, then you switch to another one, and it’s very concerning for the Court.”

⁹ On April 18, the district court then entered an order denying the motion for reconsideration and dissolving the temporary stay. (Ex. 5 to Mot.)

more than ample resources—waited ten days to file its “Emergency” Motion. Metro also failed to advise Petitioners until a mere day before it filed. And, despite waiting 10 days, Metro’s Motion is rife with procedural flaws. Thus, even if the NRAP 8(a) test were satisfied, which it is not, emergency relief is not warranted.

ARGUMENT

I. METRO FAILED TO MEET THE REQUIREMENTS FOR EMERGENCY RELIEF.

Metro assumes it is entitled to immediate attention, but any emergency is of Metro’s own making. The Costs Order was entered on March 9. As the district court pointed out (Ex. I (4/10 Hrng. Tr.), p. 15:1-24), Metro should have either appealed from the outset or filed a motion for reconsideration, rather than abandoning its Initial Motion once it was asked to supplement.¹⁰ Metro also delayed filing its Motion and did not comply with the requirements for emergency relief. Its Motion has five fatal flaws, each of which precludes the issuance of an emergency stay.¹¹

A. Metro Failed to File at the Earliest Possible Time.

There is no justification for the delay between April 10, the date Metro learned

¹⁰ Metro offered the district court two explanations for its delay: first, it argued that Metro had 30 days to appeal the Disclosure Order. (Ex. I (4/10/18 Hrng. Tr.), p. 16:11-15.) Second, Metro asserted it waited because it had ten days from the entry of the first order to file its motion for reconsideration. (*Id.*, p. 19:12-18.)

¹¹ See *Half Dental Franchise, LLC v. Houchin*, 403 P.3d 685, 2017 WL 3326425 at *1, n.1 (2017) (unpublished) (denying emergency motion because, *inter alia*, “any emergency was of [movant’s] own making”).

it was denied a stay in district court, and April 20, the date Metro sought emergency relief from this Court. In light of Metro’s resources and those of its counsel, it could have (and should have) filed its Motion “at the earliest possible time.” If the Motion were in fact an emergency it could have been filed the same day as the hearing on the district court stay—or at least within one or two days. Instead, Metro waited ten days (and, as discussed above, stayed silent with regard to its intentions for nine of those days). In contrast, this Court only granted the Petitioners two business days to respond to the Motion. In light of Metro’s delays, this Court may summarily deny this motion.¹²

Notably, Metro delayed filing its Motion even though it should have known it risked contempt of the Disclosure Order since April 10, 2018, when the district court announced it was dissolving the stay. Metro erroneously contends that these proceedings are under an “automatic stay in accordance with NRCP 62(a)” that expires on May 2, 2018. (Mot., p. 2; *see also* p. 11 (Certificate) (stating that the “order dissolving the ... stay expires on May 2, 2018)). No stay is in effect because the April 18, 2018 order denying reconsideration and dissolving the temporary stay (Ex. 9 to Mot.) is not subject to any sort of automatic stay. Rule 62(a) only automatically temporarily stays a “judgment,”¹³ defined by the Nevada Rules of

¹² *Id.*, at *1, n.1 (denying emergency motion for leave filed six days before oral argument that could have been filed earlier).

¹³ NRCP 62(a) provides that “no execution shall issue upon a **judgment** nor shall

Civil Procedure as “a decree and any order from which an appeal lies.” NRCp 54(a). NRAP 3A(b), which designates the judgments and orders from which an appeal may be taken, does not include an order denying a motion for reconsideration.¹⁴

Because of its own delays and gamesmanship in abandoning its motion for reconsideration, there is no stay in effect;¹⁵ Metro is in contempt of the Disclosure Order, reinforcing the fact Metro did not file as soon as possible.

B. Metro Failed to Provide Timely Notifications.

While it took its time preparing its “emergency” filing, Metro intentionally failed to timely notify this Court and opposing counsel of its plans to file, in contravention of NRAP 27(e)(1), which mandates:

Before filing the motion, the movant shall make every practicable effort to notify the clerk of the Supreme Court, opposing counsel, and any opposing parties proceeding without counsel and to serve the motion at the earliest possible time. If an emergency motion is not filed at the earliest possible time, the court may summarily deny the motion.

proceedings be taken for its enforcement until the expiration of 10 days after service of written notice of its entry.” (Emphasis added.)

¹⁴Therefore, it is not an appealable order. “[W]here no statutory authority to appeal is granted, no right exists.” *Taylor Const. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984); *see also Alvis v. State, Gaming Control Bd.*, 99 Nev. 184, 660 P.2d 980 (1983), *disapproved on other grounds by AA Primo Builders v. Washington*, 126 Nev., 245 P.3d 1190 (2010) (noting that no appeal may be taken from an order of reconsideration).

¹⁵ Arguably, the failure to correctly identify the date by which action is necessary is yet another (the fifth) procedural defect. *See* NRAP 27(e)(2) (requiring the motion identify “the date or event by which action is necessary.”); *see also Arpino v. Sandoval*, 387 P.3d 216, 2017 WL 176602 at *1, n.1 (2017) (unpublished) (noting requirement of identifying specific date by which action is necessary).

While it learned the district court denied the stay on April 10, Metro did not inform opposing counsel until April 19, just before its filing was apparently ready.

C. Metro Failed to Certify Irreparable Harm.

To justify its demand for emergency relief from this Court, Metro must also certify irreparable harm. *See* NRAP 27(e) (allowing for emergency relief if “movant **certifies** that to avoid irreparable harm relief is needed in less than 14 days”) (emphasis added). Setting aside its false assertion that there is any stay in effect until May 2, all Metro essentially asserts is that it is subject to an order. (Mot., p. 11 (Certification) (“... emergency relief is needed on or before May 2, 2018 because the automatic stay expires on May 2, 2018”)). While Metro includes some conclusory *arguments* that it faces irreparable harm, making arguments is not the same thing as certifying.¹⁶

D. Metro Failed To Raise All Issues In District Court.

While Metro did file its OST Motion in the district court (NRAP 8 (a)(1)), it failed to include all the grounds it included in its Motion to this Court. (*Compare generally* OST Motion (Ex. 3 to Mot.) with Mot.)¹⁷ Now, Metro fails to explain why

¹⁶ *See, e.g.*, Black’s Law Dictionary (10th ed. 2014):

certify *vb.* ... **1.** To authenticate or verify in writing. **2.** To attest as being true or as meeting certain criteria. **3.** (Of a court) to issue an order allowing a class of litigants to maintain a class action; to create (a class) for purposes of a class action. *See* certification. *Cf.* decertify...

¹⁷ Issues that Metro failed to submit to the district court but now advances include

this does not require denial. See Mot.; NRAP 27(e)(4) (“If the relief sought in the motion was available in the district court, the motion **shall** state whether all grounds advanced in support of the motion in the court were submitted to the district court, and, if not, why the motion should not be denied.”) (emphasis added). Indeed, in district court, Metro made no substantive argument regarding the NPRA or disclosure at all; instead it baldly asserted (in one paragraph and without any support, citations, or even argument) that the two issues it raised were “significant legal issues” that “involve unsettled and contentious areas of the NPRA.” (Mot., Ex. 3, p. 8:12-13.) Rule 27(e)(4) was plainly designed to prohibit exactly what Metro did here: waste judicial resources by not meaningfully complying with NRAP 8(a)(1).¹⁸

II. METRO ALSO FAILED TO COMPLY WITH RULE 8.

NRAP 8(a)(2) sets forth “[c]onditions on relief” before a stay can be granted. It mandates that a motion for a stay “shall” “state any reasons given by the district court for its action.” NRAP 8 (a)(2)(A)(ii). While the order denying the stay has not been entered, Metro’s counsel attended the hearing and could have ordered the transcript. The district denied the stay due to Metro’s gamesmanship and because

its discussion regarding investigative techniques. (Mot., pp. 2-3 and pp. 9-10.)

¹⁸ Moreover, Metro’s failure to raise substantive arguments at the district court regarding the need for a stay could be construed as a waiver of its right to raise those arguments for the first time here. *Cf. Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”) (citation omitted).

the factors, particularly likelihood of success on the merits, do not justify a stay (Ex. I, p. 25:16-18 (“any urgency as far as a stay . . . was really created by Metro”); *id.* pp. 26:16-27:15 (Metro had not demonstrated a likelihood of prevailing.))

III. METRO FAILS TO SUBSTANTIVELY ESTABLISH THAT A STAY IS WARRANTED.

Even if its request for a stay on an emergency basis were not replete with procedural flaws, Metro’s Motion would still have to be denied pursuant to Rule 8.

A. Metro Misstates Key Aspects of the Legal Standard.

The general factors for a stay are set forth in NRAP 8(c) and are not disputed. However, Metro misapprehends the law governing stay requests in two significant ways. First, Metro significantly understates its burden with regard to the fourth stay factor, likelihood of success. NRAP. 8(c)(4). Metro correctly cites *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000), which held that while “a movant does not always have to show a probability of success on the merits, the movant must a present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” (citation and internal quotation marks omitted). However, all Metro argues is that there are “significant legal issues.” (*See* Motion, p. 9:9-15 (“[t]here are two significant legal issues...”) As detailed below,

Metro’s legal arguments are not in fact significant,¹⁹ but even if they were, that does not suffice: Metro must show a “substantial case on the merits”—*and must clearly show that the balance of the equities weigh in its favor*. *Hansen*, 116 Nev. at 659, 6 P.3d at 987. Second, without authority, Metro baldly states that “the ‘public interest’ is not a factor for consideration under Nevada law.” (Mot., p. 5.)²⁰ This is not the case. As Justice Cherry very recently observed:

NRAP 8 does not preclude this court from considering the public interest when determining whether a stay is warranted. *See* NRAP 8(c) (appellant courts “will generally consider” the listed factors in considering stay motions); *see also* *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987) (providing that federal district and appellate courts will consider, as one factor, “where the public interest lies” when deciding a stay motion).

Clark Cty. Office of Coroner/Med. Exam’r, 134 Nev. Adv. Op. 24 (Cherry, J., dissenting in part, fn. 1). Here, the “equities” (and, thus, the public interest) are necessarily at play because Metro—rather than asserting a likelihood of success of the merits—is relying on the “substantial case on the merits” test set forth in *Hansen*.

¹⁹ Further, one of the two alleged “significant legal issues” is an irrelevant costs argument. *See Taddeo v. Am. Invsco Corp.*, No. 2:12-CV-01110 APG NJK, 2014 WL 12708859, at *1 (D. Nev. Sept. 19, 2014) (“simple monetary damages generally are not considered to be irreparable harm”)

²⁰ It is telling that, while Metro improperly characterizes the Review-Journal’s discussion of the NPRA and the public interest as irrelevant, its Motion barely mentions the NPRA. Where it does discuss the NPRA, Metro misstates the law, citing only to *Donrey* in its mention of the balancing test. (Mot., p. 9). As this Court is well aware, the NPRA’s balancing test has been strengthened to favor access since *Donrey*. *See, e.g., Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011). The correct legal standard is set forth below.

Hansen, 116 Nev. at 659, 6 P.3d at 987 (“a movant does not always have to show a probability of success on the merits, the movant must ‘present a substantial case on the merits when a serious legal question is involved and show that the **balance of equities weighs heavily in favor of granting the stay**’”) (quoting from and citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981)) (emphasis added). Thus, despite relying on *Hansen*, Metro ignores the equitable aspect of the test that applies where a party does not establish likelihood of success on the merits.

Metro also ignores that whether to grant a stay is inherently an equitable decision, *Hansen*, 116 Nev. at 659, 6 P.3d at 987, and that considering the public interest lies with prompt release of public records to the Review-Journal is necessarily part of balancing the equities. It is black-letter law that when considering any sort of stay, courts consider the equities and the public interest. In *Ruiz v. Estelle*, cited and quoted by this Court in *Hansen*, the Fifth Circuit considered whether to issue a stay pursuant to Rule 8 of the Federal Rules of Appellate Procedure and evaluated “whether the granting of the stay would **serve the public interest.**” *Ruiz*, 650 F.2d at 565 (citations omitted) (emphasis added). Moreover, Metro cannot ignore that the strong mandates of the NPRA—particularly the presumption in favor of access to promote transparency—are directly relevant to both the irreparable harm factor and Metro’s lack of likelihood of success. Metro’s gamesmanship is also

pertinent to this Court’s evaluation of the equities.²¹

B. The “Object of Appeal” Factor Does Not Weigh In Metro’s Favor.

The object of Metro’s appeal will not be defeated if it has to comply with the disclosure order while the appeal is pending. Thus, this factor (NRAP 8(c)(1)) does not weigh in favor of a stay. While Metro is correct that it will not be able to “claw back” records after they are produced (Mot., p. 7), as fully discussed below, despite being provided with every opportunity, Metro has not established irreparable harm with regard to any confidentiality claim or disclosure of any specific records at issue. Without irreparable harm, Metro should not be able to resist disclosure by claiming that the object of its appeal will be defeated. Further, legal questions (including those raised by the Review-Journal’s cross-appeal) can still be addressed by this Court.²²

To the extent that the object of Metro’s appeal—withholding all public records about 1 October—is defeated, it is Metro’s own fault. If there are specific

²¹ Metro’s discussion of the purpose of stay (Mot., p. 6) is not relevant to the stay factors themselves; Metro is not entitled to an automatic stay of an order mandating disclosure pursuant to the NPRA.

²² The disputes between the Review-Journal and Metro are not moot. *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171–72, 87 P.3d 1054, 1057 (2004) (the “capable of repetition, yet evading review” exception to the mootness doctrine applies when the duration of the challenged action is “relatively short,” and there is a “likelihood that a similar issue will arise in the future”). The undersigned attests that the Review-Journal and Metro have other ongoing disputes regarding the NPRA that relate to the legal issues in this case. Further, issues pertaining to the NPRA typically evade review—both due to the inability of requesters to litigate every public records dispute and the short timeframe that most records are newsworthy.

records that merit nondisclosure, Metro has not established that. Instead, Metro has resisted providing specific information that supports its claims of confidentiality at every step. It would be manifestly unjust—and eviscerate the efficacy of the NPRA—to now grant a stay on appeal. In short, Metro should have made its case and provided information in district court. Having refused to do so, Metro cannot now benefit from its own failings. If Metro were to prevail in its appeal of the Costs Order, it would then be entitled to the payment it imagines it is entitled to now.²³ In any case, to save costs and efforts on both sides, Petitioners (despite their lack of information) have repeatedly attempted to work with Metro to streamline and prioritize but Metro has refused to cooperate.²⁴

C. Metro Does Not Face Irreparable Harm From Releasing Records.

Compliance with the Disclosure Order in and of itself cannot be “irreparable harm”—or every governmental entity would simply file appeals of every court order

²³ As this Court has explained in the context of an appeal addressing whether payment of a monetary judgment pending an appeal renders the appeal moot, “payment of a judgment only waives the right to appeal or renders the matter moot when the payment is intended to compromise or settle the matter.” *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 265, 71 P.3d 1258, 1261 (2003); *accord Jones v. McDaniel*, 717 F.3d 1062, 1069 (9th Cir. 2013).

²⁴ Petitioners have endeavored to work with Metro to obtain information about responsive records and narrow the scope of the records requests based on that information to facilitate the disclosure of records—and minimize costs. (See Ex. H (Petitioners’ Opp. to Initial Mot.) at p. 5:15-22; *see also* Ex. 4 thereto (3/14/18 letter to Metro); *see also* Ex. 10 to Mot. (Petitioners Opp. to OST Motion) at p. 5, nn. 3 and 4; *see also* Declaration of Margaret A. McLetchie attached to same.)

mandating production under the NPRA. This would be at odds with the whole point of the NPRA, the stated purpose of which “is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law” (NRS 239.001(1)), the terms of which “must be construed liberally to carry out this important purpose” (NRS 239.001(2), and “limitations on which must be narrowly construed.” (NRS 239.001(3)).

If governmental entities are granted stays in cases such as this one—where Metro has engaged in gamesmanship and failed to provide specific information despite being given every opportunity—these legislative mandates would be violated. Delays and gamesmanship would be incentivized. Democratic principles would not be furthered because transparency and accountability would be thwarted. Indeed, when newsworthy records are at issue that may cast governmental entities, employees, or officials in a poor light, the government would just delay production to avoid the news cycle and public scrutiny, fail to litigate in good faith,²⁵ and then file low-merit appeals.²⁶

²⁵ Notably, the Review-Journal cannot litigate every violation of the NPRA it faces, and most requesters do not have the resources to litigate at all.

²⁶ Further, it is of note that Metro’s only argument against disclosure in this case is its claim that its interests against disclosure outweigh the interests in favor of access. The NPRA mandates that “[a]ny exemption, exception or **balancing of interests** which limits or restricts access to public books and records by members of the public must be construed narrowly.” NRS 239.001(3) (emphasis added). This Court’s evaluation of Metro’s claim of irreparable harm (as well as its likelihood of success) must take this narrow construction into consideration.

If Metro truly faced irreparable harm if records (or some portion thereof) were disclosed, it could have complied with the NPRA's provision requiring it to provide authority justifying withholding each record (NRS 239.0107(d)(2)), and the district court's order requiring it to supplement its motion for reconsideration to support withholding. (Ex.8 to Mot., p. 2:14-16 of Order; *see also* Ex. G (3/22/18 Status Check Tr.), pp. 5:19-6:9 (district court noting that supplemental briefing was necessary because Metro relied on "generalities" regarding confidentiality).) Having failed to do so, Metro not only y delayed litigation but also failed to establish irreparable harm.

D. Metro Does Not Face Irreparable Harm From the Costs Order.

Metro appears to assert that it faces irreparable harm due to the Costs Order. As a matter of law, this argument fails. First, the mere possibility of irreparable injury is not sufficient to warrant a stay. *See Nken v. Holder*, 556 U.S. 418, 435(2009) (citing *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 22 (2008)); *accord In re R & S St. Rose Lenders, LLC*, No. 2:17-CV-01322-MMD, 2017 WL 2405368, at *3 (D. Nev. June 2, 2017). Second, monetary harm does not justify a stay or other injunctive relief. *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. Adv. Op. 38, 351 P.3d 720, 725 (2015) (finding that the district court did not abuse its discretion when a party failed to show that it would suffer irreparable harm for which compensatory damages were not an adequate remedy if the district court did

not enter a preliminary injunction); *In re Capability Ranch, LLC*, No. 2:13-CV-1812 JCM, 2013 WL 6058198, at *3 (D. Nev. Nov. 15, 2013) (holding that forcing losing party to pay attorney's fees does not constitute irreparable harm); *see also Orquiza v. Walldesign, Inc.*, No. 2:11-CV-1374 JCM CWH, 2013 WL 4039409, at *2 (D. Nev. Aug. 6, 2013) ("Monetary damages alone do not amount to irreparable harm"); *Taddeo v. Am. Invsco Corp.*, No. 2:12-CV-01110 APG NJK, 2014 WL 12708859, at *1 (D. Nev. Sept. 19, 2014) ("simple monetary damages generally are not considered to be irreparable harm"); *see also Town Ctr. Drive & 215, LLC v. Bank of Am., N.A.*, No. 60672, 2014 WL 3764503, at *3 (Nev. July 29, 2014) (no irreparable harm when injunction-seeking plaintiff would only be entitled to monetary damages). This Court has also held that "litigation costs, even if potentially substantial, are not irreparable harm." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39(2004) (citing *Hansen*, 116 Nev. at 658, 6 P.3d at 986-7).

E. The Review-Journal Faces Irreparable Harm, and the Public Interest Weighs Against A Stay.

The Review-Journal faces irreparable harm if a stay is granted; it is seeking records so it can report on *the news*. Further, delays in the production of public records necessarily constitute irreparable harm. The legislative intent underpinning the NPRA is to foster democratic principles by ensuring easy and expeditious access to public records. Nev. Rev. Stat. § 239.001(1); *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) (holding that "the provisions of the

NPRA are designed to promote government transparency and accountability”). As discussed above, delays thwart transparency and accountability. Further, the principle that public records should be available quickly is woven throughout the NPRA. *See* NRS 239.010(1) (providing that public records must be “open at all times during office hours” for inspection and/or copying); NRS 239.0107(1); NRS 239.011(2) (mandating that a court give an application for public records “priority over other civil matters”).) The NPRA is designed to provide quick access to records, not to reward non-compliance and gamesmanship. Granting a stay would run contrary to these principles and create a perverse incentive for Metro and other governmental agencies to engage in litigation tactics which would thwart this important goal of the NPRA.²⁷

F. Metro Did Not, and Cannot, Establish Likelihood of Success.

1. Metro’s Burden In Withholding Records.

Contrary to Metro’s arguments, this case does not present novel questions.

²⁷Contrary to Metro’s assertions (Mot., p. 8), Petitioners have not delayed in this matter. As detailed above, Petitioners have endeavored to work with Metro to obtain information about responsive records and obtain compliance. *See also* Ex. J (4/23/18 letter re: compliance if stay is denied). Petitioners have very diligently litigated this case, balancing competing immediate tasks in this matter over just the recent few weeks (for example, the fees and costs motion was submitted on 4/19). Further, there are no delays with regard to order submissions. For example, the order denying the stay is not due until April 24, 2018 (*see* Eighth Judicial District Court Rule 7.2), the transcript from the 4/10 hearing was just received on 4/18, and a draft order was provided to Metro on 4/23. Entry of the Disclosure Order was likewise not delayed, and would not have resulted in compliance while the costs and fees issue was still being resolved.

While this Court has not considered the applicability of the NPRA to each and every possible type of public record, the Legislature and this Court have made the application of the NPRA very clear: in accordance with the presumption of openness and “emphasis on disclosure”²⁸ that underpins the NPRA, governmental entities bear a heavy burden in justifying disclosure. They must both: (1) establish by a preponderance of the evidence that the records are confidential; and (2) prove that an “interest in disclosure clearly outweighs the public’s interest in access.” *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).²⁹ Under this established law and the facts of this case, Metro has not and cannot establish that a “significant legal issue” is at play, let alone a likelihood of success. Moreover, it has not established that the alleged “significant legal issues” cannot be addressed through redaction. *See LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 611 (2015) (“If the public record contains confidential information that can be redacted, the governmental entity with legal custody or control of the record cannot rely on the confidentiality of that information to prevent disclosure of the public record”) (citing NRS 239.010(3)).

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²⁸ *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011) (“[T]he provisions of the NPRA place an unmistakable emphasis on disclosure”).

²⁹ “It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.” *DR Partners v. Bd. of Cty. Comm’rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citation omitted).

2. Metro Cannot Establish Likelihood of Success Because it Refused to Support its Claims of Confidentiality.

Metro has not earnestly endeavored to meet its burden under the NPRA. Instead, it has played hide-the-ball from the start. First, it refused to comply with NRS 239.0107(1)(d), which mandates that, *within five (5) days of a request*:³⁰

If the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing: (1) Notice of that fact; and (2) **A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.**

Metro either ignored requests for records about 1 October (*see* Ex. A (Amended Petition), p. 4:18-19), or just provided cursory responses³¹ such as: “[a]t this time any records responsive to your request is [sic] confidential and privileged pending the outcome of the investigation. *See Donrey v. Bradshaw*, 106 Nev. 360.....” (*See* Ex. A (Amended Petition), Ex. 5 thereto (response to request for 911 Records).) Such generalized reliance on *Donrey* does not satisfy NRS 239.0107(1)(d). *Donrey* does not “make” any “public book or record, or a part thereof, confidential;” all *Donrey* did was allow for a balancing test—and that test has been since modified to

³⁰ *See* NRS 239.0107(1) (mandating that, within five business days, a governmental entity respond to a request and requiring one of the four courses of action delineated—providing records immediately (a), providing a future date certain by which the records will be provided (c), explaining that another entity has the records (b), or providing the specific denial described above (d)).

³¹ The Review-Journal contends that noncompliance with NRS 239.0107(1)(d) waives confidentiality claims not timely raised. (*Compare* Ex. 1 to Mot., p. 3, ¶ 11.)

further favor access, as discussed above.

Once litigation commenced, Metro continued to play hide-the-ball. For example, in its district court opening brief, the Review-Journal specifically asked for a privilege log (*see* Ex. B, p. 17:11-24)—but Metro never provided one. (Ex. C (Opp. to Review-Journal Pet., pp 18:21-19:25.) Metro did not just refuse to provide the Petitioners with this information: it refused to provide it to the district court. After reassignment, rather than summarily denying Metro’s unsupported motion for reconsideration and motion for stay, the district court gave Metro another chance to support withholding—but Metro refused.³² As the district court explained, Metro is “appealing basically the fact that a blanket objection was given, but [it has] never given the Court the ability to rule on the substance of those objections.” (Ex. I (4/10 Hrng. Tr.), p. 22:4-6.) This was so even though the district court gave Metro “additional time to . . . just cite the law.” (*Id.*, p. 22:6-9.) Thus, Metro has necessarily failed to: (1) produce a “preponderance of the evidence” to establish that a claim of confidentiality applies; and (2) establish that any such claim outweighs the presumption of access. *See, e.g., Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).

³² (Ex. I, p. 26:19-25 (“All the Court simply asked was for additional law . . . , the question has always been for this Court, which documents are subject to protections under the law. And that’s never been provided to this Court. All the Court simply asked [for] was a breakdown).)

3. Metro Has No Remaining Claim that the 911 Records Are Confidential.

Metro has never asserted claim that its “investigative techniques” claim applies to any records other than Body Cam Footage.³³ Instead, Metro asserted that release of the records would jeopardize an ongoing investigation (*see* Ex. C; Metro Opp. to Review-Journal Pet.). This argument never had weight, but Metro has since abandoned it. At the April 10 hearing, Metro admitted that there was no longer an ongoing investigation because the second suspect’s name (Douglas Haig) was released,³⁴ and admitted it was accordingly changing its arguments.³⁵ This raises two key issues. First, it reveals that Metro’s purported basis for withholding records was a sham. Mr. Haig was federally charged with conspiracy to manufacture and sell armor-piercing ammunition without a license.³⁶ It is impossible to imagine how protecting the investigation into Mr. Haig would implicate each and every record Petitioners sought regarding 1 October. The claim that there was an “ongoing

³³ Metro just recently disclosed that some records at issue (such as no-bid contracts) did not exist. (*See* Mot., Ex. 10 (Joint Opp. to OST Motion) and Ex. 1 thereto (3/14/18 letter).) Metro was obligated to do so within five business days of the requests (NRS 239.0107(1)(d)).

³⁴ *See* <https://www.reviewjournal.com/crime/shootings/search-warrant-document-names-2nd-person-of-interest-in-las-vegas-shooting/> (last accessed April 23, 2018).

³⁵ Ex. I (4/10 Hrng. Tr.), p. 21:9-17 (“... when initially our petition was filed, there was an ongoing investigation. And then there was the search warrant.”... “this whole entire case took a different turn”... “that was our initial argument in the petition that there was an ongoing investigation”).

³⁶ *See* <https://www.reviewjournal.com/crime/shootings/prosecutors-charge-arizona-man-who-sold-ammo-to-las-vegas-shooter/> (last accessed April 23, 2018).

investigation” that would be jeopardized if *any* record about 1 October was disclosed was always baseless. While it may have applied to some records at issue, Metro never specified that—instead, it asserted its now-defunct “ongoing investigation” privilege to justify withholding each and every record at issue.

Metro is not now entitled to take “a different turn” (Ex.I; 4/10 Tr., p. 21:14) because the prior claim of confidentiality has been revealed as a sham. Metro has been given every opportunity to explain which records are confidential and why. It is now too late. Indeed, Metro only asserts a vague claim that its “investigative techniques” will be jeopardized, and only seems to be asserting this claim with regard to Body Cam Records. (Mot., p. 9; *see also* Ex. C (Opp. to Review-Journal Pet.))

This Court should not issue a stay; Metro should produce all records without further delay.³⁷ Metro itself agreed to produce records once the purported investigation was complete. (*See* Ex. A (Am. Pet.) at Ex. 5 (“Until the case is closed the investigatory information you have requested cannot be provided.”).)

4. Metro Fails to Establish the Application of its Sole Remaining Claim of Confidentiality.

Metro raises a nebulous argument not raised in its OST Motion: that its “interest in its investigative techniques substantially outweighs the public’s interest

³⁷ Metro should cooperate with Petitioners to facilitate speedy and cost-effective production so that, regardless who prevails on appeal, costs are minimized.

in disclosure of public records” and appears to assert this claim with regard to Body Cam Records. (Mot., p. 9.) Metro erroneously claims that the district court ignored this issue. (*Compare*., *e.g.*, Ex. E (2/7/18 Hrng. Tr.), p. 31:6-7; *see also* Ex. 1 to Mot (Disclosure Order), p. 2:15-16 of Order (the court considered all briefs).) It was Metro that failed to provide evidence that any “investigative techniques” would be jeopardized by release of any specific records. (See Ex. D, p. 12:14-15; Mot., pp. 2-3.)

Even if Metro had a valid claim of confidentiality, it does not warrant full withholding. The statute pertaining to body worn camera footage explicitly states that the footage is a public record that must either: (1) be produced, with redactions to protect any confidential information, or (2) if redactions are not possible, be made available for in-person inspection. NRS 289.830(2).³⁸ This is consistent with the NPRA (NRS 239.010(3)) which requires redaction if only part of a record is confidential. As this Court has made clear to Metro before:

... LVMPD cannot deny a public records request on the basis of confidentiality if it “can redact, delete, conceal or separate the confidential information from the information included in the public book or record.”

³⁸ The statute provides: “Any record made by a portable event recording device pursuant to this section is a public record which may be: (a) Requested only on a per incident basis; and (b) Available for inspection only at the location where the record is held if the record contains confidential information that may not otherwise be redacted.”

LVMPD v. Blackjack Bonding, 131 Nev. Adv. Op. 10, 343 P.3d 608, 614 (2015) (quoting from and citing NRS 239.010(3).) Even if Metro had met its burden of producing a preponderance of the evidence that release of the Body Cam Footage would somehow jeopardize “investigative techniques,” any such concern must be addressed through redactions or allowing inspection, consistent with both the NPRA and the law governing body cam footage.³⁹ Even Metro admits that even if some Body Cam Footage is confidential, Petitioners are entitled to inspect it (*See* Mot., p. 9 (citing NRS 289.830).) The Review-Journal has offered to do so. (Ex A (Review-Journal’s Amended Petition), p. 5, ¶ 23.) Metro has not provided access.

Metro also invokes FOIA Exemption 7(E) as a basis for not disclosing the Body Cam Records. (Mot., pp. 2-3.) As a foundational matter, FOIA does not control these proceedings. At most, FOIA is nominally persuasive authority that this Court is not bound to follow. Even if FOIA Exemption 7(E) did apply, routine and generally known investigative techniques are not subject to it. *See Rosenfeld v. U.S. Dep’t. of Justice*, 57 F.3d 803, 815 (9th Cir. 1995) (“It would not serve the purposes of FOIA to allow the government to withhold information to keep secret an investigative technique that is routine and generally known.”) (citations omitted).

Metro has not only failed to meet its burden, it has refused to do so, as detailed

³⁹ Statutory exemption 7(E) of FOIA (5 U.S.C. § 552(b)(7)(E)) does not exist under the NPRA. Accordingly, the Court need not even consider it as persuasive authority.

above. In short, Metro has not produced a preponderance of the evidence that release of any of the Body Cam Footage will jeopardize investigative techniques,⁴⁰ let alone how such a claim outweighs the presumption in favor of access. Metro must produce all records without further delay, and a stay is not warranted.

5. Metro Is Not Likely to Prevail in its Appeal of the Costs Order.

As set forth above, because it only involves the amount of fees and costs Metro is entitled to demand from Petitioners for producing the records at issue, the Costs Order cannot warrant a stay. In any case, Metro is not likely to prevail. The NPRA sets specific limits on the fees a governmental entity may charge in relation to a public records request. NRS 239.052(1) provides that “a governmental entity may charge a fee for providing a *copy* of a public record.” (Emphasis added.) This fee must also “not exceed the ***actual cost of the governmental entity*** to provide the copy of a public record unless a specific statute or regulation sets a fee that the governmental entity must charge for the copy.” *Id.* (emphasis added). NRS 239.055 does also provide that a governmental entity may charge a fee not to exceed 50 cents per page if a request for a public record would require “extraordinary use” of its personnel or technological resources.

⁴⁰ Even assuming Metro had properly asserted a claim regarding the Body Cam Records, the claim would have to be applied narrowly. *See* NRS 239.001(3) (“Any... balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly.”)

However, interpreting NRS 239.055 to limit public access by requiring requesters to pay public entities “extraordinary use” fees for responding to good faith NPRA requests (as Metro has urged in this matter) is inconsistent with the plain terms of the NPRA, as well as the legislative mandate to interpret its provisions liberally (NRS 239.001(2)) and impediments to access narrowly (NRS 239.001(2)).⁴¹

CONCLUSION

Metro’s Motion fails procedurally and substantively. In contrast, the Review-Journal and the public face ongoing and irreparable harm if further delays are permitted to the public’s records. The Motion must be denied.

DATED this the 24th day of April, 2018.

/s/ Margaret A. McLetchie

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⁴¹ It is far more likely that the Review-Journal will prevail in its cross-appeal of the district court’s Costs Order, as the order erroneously allows the Metro to charge certain fees for the production of certain responsive public records, some of which are not permitted by law. For example, the Costs Order permits the Metro to charge fees for “gather[ing], discuss[ing], supervis[ing] and insur[ing] quality control,” activities that the Metro cannot bill for under the NPRA. (Ex. 2 to Mot., p. 8:14-16.)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT/CROSS-APPELLANT'S RESPONSE TO APPELLANT/CROSS-RESPONDENT'S EMERGENCY MOTION FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION was filed electronically with the Nevada Supreme Court on the 24th day of April, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Craig R. Anderson, Nick D. Crosby, and Jackie V. Nichols

MARQUIS AURBACH COFFING

*Counsel for Appellant/Cross-Respondent,
Las Vegas Metropolitan Police Department*

Joel E. Tasca and Justin A. Shiroff

BALLARD SPAHR LLP

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American Broadcasting Companies, Inc., The Associated Press, Cable News Network, Inc., Chesapeake Media I, LLC, d/b/a KSNV-TV, Los Angeles Times Communications, LLC, The New York Times Company, and WP Company LLC d/b/a The Washington Post*

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FURTHER, I hereby certify that on the 24th day of April, 2018, the foregoing RESPONDENT/CROSS-APPELLANT'S RESPONSE TO APPELLANT/CROSS-RESPONDENT'S EMERGENCY MOTION FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION was served on the Settlement Judge by mailing a true and correct copy thereof, postage prepaid, addressed to:

Lansford Levitt
4230 Christy Way
Reno, NV 89519
Settlement Judge

/s/ Pharan Burchfield
Employee of McLetchie Shell LLC

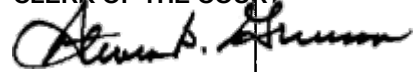
Exhibit Index for Las Vegas Review-Journal's Response to Las Vegas Metropolitan Police Department's Emergency Motion for Relief Under NRAP 27(e)

Exhibit	Document/Description	Date
A	Petitioner Las Vegas Review Journal's Amended Public Records Act Application Pursuant to Nev. Rev. Stat. 239.001/ Petition for Writ of Mandamus - Expedited Matter Pursuant to Nev. Rev. Stat. 239.011 [including Exhibit 5 only]	12/06/2017
B	Petitioner Las Vegas Review Journal's Opening Brief in Support of Amended Public Records Act Nev. Rev. Stat. 239.001/ Petition for Writ of Mandamus [exhibits omitted]	12/08/2017
C	Respondent Las Vegas Metropolitan Police Department's Opposition to Petitioner Las Vegas Review Journal's Public Records Act Application Pursuant to Nev. Rev. Stat. 239.001 / Petition for Writ of Mandamus (Expedited Matter Pursuant to Nev. Rev. Stat. 239.001) [exhibits omitted]	01/08/2018
D	Respondent Las Vegas Metropolitan Police Department's Opposition to Joinder to Opening Brief in Support of Amended Public Records Act Nev. Rev. Stat. 239.001/ Petition for Writ of Mandamus [exhibits omitted]	01/16/2018
E	Transcript Re: Amended Petition	02/07/2018
F	Las Vegas Metropolitan Police Department's Motion for Reconsideration and Stay Pending Reconsideration [exhibits omitted]	03/16/2018
G	Transcript Re: Status Check Re: Briefing Schedule of LVMPD Motion for Reconsideration and Request for Stay	03/22/2018
H	Joint Opposition to Las Vegas Metropolitan Police Department's Motion for Reconsideration and Stay Pending Reconsideration [including Exhibit 4 only]	04/04/2018
I	Transcript Re: Las Vegas Metropolitan Police Department's Motion for Stay Pending Resolution on Appeal on an Order Shortening Time	04/10/2018
J	Ms. McLetchie's Letter to Mr. Crosby and Ms. Nichols	04/23/2018

Exhibit Index for Las Vegas Metropolitan Police Department's Emergency Motion for Relief Under NRAP 27(e)¹		
Exhibit	Document/Description	Date
1	Notice of Entry of Order Re: Order Granting Amended Public Records Act Applications Pursuant to Nev. Rev. Stat. §239.011/Petition for Writ of Mandamus.	03/02/2018
2	Order Regarding Public Records Request.	03/09/2018
3	Las Vegas Metropolitan Police Department's Motion for Stay Pending Resolution on Appeal on an Order Shortening Time.	04/03/2018
4	Docket Minutes Re: Motion for Stay.	04/10/2018
5	Notice of Entry of Order Denying Las Vegas Metropolitan Police Department's Motion for Reconsideration and for Stay Pending Reconsideration.	04/18/2018
6	District Court Docket/Register of Actions.	04/19/2018
7	Las Vegas Metropolitan Police Department's Brief Regarding Fees Permitted to be Charged in Responding to Public Records Requests.	02/14/2018
8	Notice of Entry of Order Re: 04/13/2018 Order	04/16/2018
9	Respondent Las Vegas Metropolitan Police Department's Notice of Appeal.	03/30/2018
10	Joint Opposition to Las Vegas Metropolitan Police Department's Motion for Stay Pending Resolution on Appeal on an OST.	04/09/2018
11	Minute Order.	03/12/2018

¹ These exhibits are attached to the Emergency Motion filed on April 20, 2018.

EXHIBIT A



1 **APET**
2 MARGARET A MCLEATCHIE, Nevada Bar No. 10931
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9 *Counsel for Petitioner, Las Vegas Review-Journal*

7 **DISTRICT COURT**

8 **CLARK COUNTY NEVADA**

9 AMERICAN BROADCASTING
10 COMPANIES, INC.; THE ASSOCIATED
11 PRESS; CABLE NEWS NETWORK,
12 INC.; CHESAPEAKE MEDIA I, LLC,
13 D/B/A KSNV-TV; LOS ANGELES
14 TIMES COMMUNICATIONS, LLC; THE
15 NEW YORK TIMES COMPANY; AND
16 WP COMPANY LLC D/B/A THE
17 WASHINGTON POST,

18 Petitioners,

19 v.

20 LAS VEGAS METROPOLITAN POLICE
21 DEPARTMENT,

22 Respondent.

23 LAS VEGAS REVIEW-JOURNAL,

24 Petitioner,

25 v.

26 LAS VEGAS METROPOLITAN POLICE
27 DEPARTMENT,

28 Respondent.

Case No.: A-17-764030-W

Dept. No.: II

AMENDED PUBLIC RECORDS
ACT APPLICATION PURSUANT
TO NEV. REV. STAT. § 239.001/
PETITION FOR WRIT OF
MANDAMUS

EXPEDITED MATTER PURSUANT
TO NEV. REV. STAT. § 239.011

Case No.: A-17-764169-W

Dept. No.: XXVI

AMENDED PUBLIC RECORDS ACT
APPLICATION PURSUANT TO
NEV. REV. STAT. § 239.001/
PETITION FOR WRIT OF
MANDAMUS

EXPEDITED MATTER PURSUANT
TO NEV. REV. STAT. § 239.011

///

COMES NOW Petitioner the Las Vegas Review-Journal (“Review-Journal”) by and through its undersigned counsel, and hereby submits this Amended Petition for Writ of Mandamus for declaratory and injunctive relief and seeking an order requiring the Las Vegas Metropolitan Police Department (“LVMPD”) to provide Petitioner access to public records. Petitioner also requests an award for all fees and costs associated with its efforts to obtain withheld public records as provided for by Nev. Rev. Stat. § 239.011(2). Further, Petitioner respectfully requests the Court expedite this matter pursuant to Nev. Rev. Stat. § 239.011(2).

Petitioner hereby alleges as follows:

NATURE OF ACTION

1. Petitioner brings the application for relief pursuant to Nev. Rev. Stat. § 239.011. *See also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884 n.4, 266 P.3d 623, 630 n.4 (2011).

2. Petitioner’s application to this Court is the proper means to secure the LVMPD’s compliance with the Nevada Public Records Act (“NPRA”), Nev. Rev. Stat. § 239.001 *et seq. Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884, 266 P.3d 623, 630 n.4 (2011); *see also DR Partners v. Bd. of Cty. Comm’rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citing *Donrey of Nev. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990)) (writ of mandamus is the appropriate procedural remedy to compel compliance with the NPRA).

3. Petitioner is entitled to an expedited hearing on this matter pursuant to Nev. Rev. Stat. § 239.011(2), which mandates that “[t]he court shall give this matter priority over other civil matters to which priority is not given by other statutes.”

PARTIES

4. Petitioner, the Review-Journal, a daily newspaper, is the largest newspaper in Nevada. It is based at 1111 W. Bonanza Road, Las Vegas, Nevada, 89125.

5. Respondent, the LVMPD, is a public agency in the County of Clark, Nevada. The LVMPD is subject to the NPRA pursuant to Nev. Rev. Stat. § 239.005(5)(b).

JURISDICTION AND VENUE

6. This Court has jurisdiction to issue writs of mandamus. Nev. Const. art. VI, § 6; Nev. Rev. Stat. § 34.160.

7. This Court has jurisdiction pursuant to Nev. Rev. Stat § 239.011, as the court of Clark County where all relevant public records sought are held.

8. Venue is proper in the Eighth Judicial District Court of Nevada pursuant to Nev. Rev. Stat. § 239.011. All parties and all relevant actions to this matter were and are in Clark County, Nevada.

STANDING

9. Petitioner has standing to pursue this expedited action pursuant to Nev. Rev. Stat. § 239.010 because public records it has requested from the LVMPD have been unjustifiably withheld.

FACTS

October 2, 2017 Requests

10. On October 2, 2017, the Review-Journal sent the LVMPD a request pursuant to the NPRA requesting:

- A log and/or call slips of any and all emergency calls received on Sunday October 1 between 8 p.m. and 2 a.m. regarding calls for service between the 3800 and 4000 blocks of South Las Vegas Blvd, including but not limited to time stamps, origin/location and address of the originating call, reason for the call, police patrol units dispatched including the patrol unit numbers, patrol unit substation and time of dispatch and time of arrival; and
- A log and/or call slips of any and all emergency calls received on Sunday October 1 between 8 p.m. and 2 a.m. regarding calls for service between the 3800 and 4000 blocks of South Las Vegas Blvd, including but not limited to time stamps, origin/location and address of the originating call, reason for the call, fire and ambulance units dispatched including, unit numbers and time of dispatch and time of arrival.

(Exhibit ("Exh.") 1.)

11. Additionally, on October 2, 2017, the Review-Journal sent the LVMPD requests pursuant to the NPRA for recordings of 911 calls for service received on October 1,

1 2017 between 8:00 p.m. and 2:00 a.m. between the 3800 and 4000 blocks of South Las Vegas
2 Blvd. (Exh. 2.)

3 12. Another reporter for the Review-Journal also sent a separate request for any
4 and all 911 calls relating to the shooting at the Route 91 Harvest Music Festival. (Exh. 3.)

5 13. On October 9, 2017, the Review-Journal contacted the LVMPD for an
6 update on its October 2, 2017 records requests. (Exh. 4.)

7 14. The LVMPD did not respond to the Review-Journal's records request until
8 October 18, 2017. (Exh. 5.) In its response, the LVMPD refused to provide any of the records
9 in the Review-Journal's request, claiming that because the records are purportedly "part of
10 an open investigation" they are "confidential and privileged pending the outcome of the
11 investigation." (*Id.*) Metro cited *Donrey v. Bradshaw*, 106 Nev. 360, 798 P2d 144 (1990) as
12 authority for its refusal. (*Id.*)

13 ***October 15, 2017 Request***

14 15. On October 15, 2017, the Review-Journal sent the LVMPD a records
15 request pursuant to the NPRA requesting "[p]urchase orders for any emergency purchases
16 on or after Oct. 1, 2017;" and "[c]opies of any emergency, no-bid contracts entered on or
17 after Oct. 1, 2017." (Exh. 6.)

18 16. As of the date of this filing, the LVMPD has not responded to this public
19 records request.

20 ***November 30, 2017 Request***

21 17. On November 30, 2017, the Review-Journal sent the LVMPD a records
22 request pursuant to the NPRA requesting "an opportunity to inspect or obtain copies of any
23 and all documents that reflect any weapons obtained through the course of the Oct. 1, 2017
24 Las Vegas mass shooting investigation that are suspected to have belonged to mass shooter
25 Stephen Paddock." (Exh. 7.) The request specifically encompassed "any returns on search
26 warrants and any documents reflecting any other weapons obtained through the course of the
27 investigation, either in Paddock's various properties - including but not limited to his car, his
28

1 Reno home and his Mesquite homes - and any other places or properties he stayed at or had
2 connections to, including but not limited to his Mandalay Bay corner suite. (*Id.*)

3 18. The LVMPD responded to the Review-Journal's November 30, 2017
4 records request by letter on November 30, 2017. (Exh. 8.)

5 19. In its November 30, 2017 response to the Review-Journal's November 30,
6 2017 request, the LVMPD stated, in conclusory fashion, that the requested records are "the
7 subject of an ongoing investigation/criminal case, and cannot be released without
8 jeopardizing the criminal case." (*Id.*) The LVMPD did not, however, explain how the release
9 of the requested records would jeopardize its investigation.

10 20. In its November 30, 2017 request, the LVMPD further stated that it was
11 denying the Review-Journal's request because the "requested record is not a public record
12 under NRS 239.010(1), and because the records are protected by the "law enforcement
13 privilege." (*Id.*) The LVMPD also cited *Donrey* as an additional basis for nondisclosure. (*Id.*)

14 21. The LVMPD also asserted in its response to the November 30, 2017 request
15 that although it is leading the investigation, other law enforcement agencies, including the
16 Federal Bureau of Investigation ("FBI"), may be in possession of records related to the
17 Review-Journal's request. (*Id.*, p. 2.)

18 22. The LVMPD also indicated in a separate November 30, 2017 email to the
19 Review-Journal that it should refer its records request to the FBI. (Exh. 9.)

20 23. Petitioner is willing to inspect the records in person.

21 LEGAL AUTHORITY

22 *Legal Framework*

23 24. The NPRA reflects that records of governmental entities belong to the
24 public in Nevada. Nev. Rev. Stat. § 239.010(1) mandates that, unless a record is confidential,
25 "all public books and public records of a governmental entity must be open at all times during
26 office hours to inspection by any person, and may be fully copied[.]" The NPRA reflects
27 specific legislative findings and declarations that "[its] purpose . . . is to foster democratic
28 principles by providing members of the public with access to inspect and copy public books

1 and records to the extent permitted by law” and that its provisions “must be construed
2 liberally to carry out this important purpose[.]” Nev. Rev. Stat. § 239.001(1) and (2).

3 25. Here, the LVMPD has not met its burden of establishing that the records it
4 is withholding should not be produced.

5 ***Failure to Timely Assert Claims of Confidentiality***

6 26. The NPRA provides that a governmental entity must provide timely and
7 specific notice if it is denying a request because the entity determines the documents sought
8 are confidential. Nev. Rev. Stat. § 239.0107(1)(d) states that, within five (5) business days
9 of receiving a request,

10 [i]f the governmental entity must deny the person’s request because the
11 public book or record, or a part thereof, is confidential, provide to the
12 person, in writing: (1) Notice of that fact; and (2) A citation to the specific
13 statute or other legal authority that makes the public book or record, or a
14 part thereof, confidential.

15 27. Accordingly, the LVMPD cannot rely on legal authority or bases for non-
16 disclosure it failed to timely assert in response to the October 2, 2017 and October 15, 2017
17 requests, and has waived any arguments against non-disclosure not timely raised.

18 ***The Records Sought Are Subject to Disclosure***

19 28. Even if it had timely asserted claims of confidentiality, the LVMPD did
20 not, and cannot, establish its heavy burden in withholding records.

21 29. In accordance with the presumption of openness and “emphasis on
22 disclosure,” both the NPRA and the Nevada Supreme Court place a high burden on a
23 governmental entity to justify disclosure.

24 30. First, the law requires that, if a governmental entity seeks to withhold or
25 redact a public record in its control it must prove by a preponderance of the evidence that
26 the record or portion thereof that it seeks to redact is confidential. *See* Nev. Rev. Stat. §
27 239.0113; *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623,
28 629 (2011); *accord Nevada Policy Research Inst., Inc. v. Clark Cty. Sch. Dist.*, No. 64040,
2015 WL 3489473, at *2 (D. Nev. May 29, 2015). It is of note that, as a general matter, “[i]t

is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.” *DR Partners v. Bd. of Cty. Comm’rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citing *Ashokan v. State, Dept. of Ins.*, 109 Nev. 662, 668, 856 P.2d 244, 247 (1993)). This is especially so in the public records context: as noted above, any restriction on disclosure “must be construed narrowly.” Nev. Rev. Stat. § 239.001(2)-(3).

31. Second, in addition to first establishing the existence of the privilege it asserts and applying it narrowly, unless the privilege is absolute, the governmental entity bears the burden of establishing that the interest in withholding documents outweighs the interest in disclosure pursuant to the balancing test first articulated in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990). See *DR Partners v. Bd. of Cty. Comm’rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (“Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests.”); see also *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 879, 266 P.3d 623, 627 (2011) (“... when the requested record is not explicitly made confidential by a statute, the balancing test set forth in *Bradshaw* must be employed” and “any limitation on the general disclosure requirements of Nev. Rev. Stat. § 239.010 must be based upon a balancing or ‘weighing’ of the interests of non-disclosure against the general policy in favor of open government”).

32. Further, in applying the *Donrey* balancing test, the burden remains squarely on the agency:

In balancing the interests . . . , the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference . . . The citizen’s predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.

Id. (quoting from *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421–22 (1961) and citing *Donrey*, 106 Nev. at 635–36, 798 P.2d at 147–48).

///

33. Here, the LVMPD has not met its heavy burden. Indeed, the LVMPD has not even attempted to identify any reason—beyond its bald assertion that the documents sought are “part of an ongoing investigation”—that would outweigh the public’s fundamental right of access to these documents. The public’s right is particularly important here because the Review-Journal is seeking access to the records to report to the public on one of the most devastating events in Las Vegas history.

34. Moreover, the *Donrey* factors do not support withholding the requested records because (1) there are no pending or anticipated criminal proceedings; (2) there are no confidential sources or investigative techniques; (3) there is no impact on any individual’s right to a fair trial; and (4) disclosure would not jeopardize law enforcement. *See Donrey*, 106 Nev. at 635-36, 798 P.2d at 147-48.

35. Additionally, the Nevada Supreme Court has repeatedly emphasized that a governmental entity cannot meet its burden of demonstrating that public records are confidential with a non-particularized showing, *DR Partners*, 116 Nev. at 627–28, 6 P.3d at 472–73, or by expressing hypothetical concerns. *Reno Newspapers v. Sheriff*, 126 Nev. 211, 218-19, 234 P.3d 922, 927 (2010).

36. Notwithstanding the frequent press conferences that Las Vegas and federal authorities conducted in the immediate aftermath of the massacre, now, a full month later, significant questions remain unanswered about the shooter’s actions and the response of public agencies.¹

37. The LVMPD’s blanket refusal to produce any of the records pursuant to the Requests is improper, and all requested information and records should be produced without redactions.

¹ *See, e.g.*, <https://www.reviewjournal.com/crime/shootings/questions-remain-in-las-vegas-strip-shooting-investigation/> (October 27, 2017 article detailing questions about the shooting investigation) (last accessed November 3, 2017); *see also* <https://www.reviewjournal.com/crime/shootings/how-the-fbi-and-atf-are-aiding-the-las-vegas-shooting-investigation/> (detailing how federal investigative agencies are assisting the LVMPD in investigating the October 1 mass shooting) (last accessed November 3, 2017).

38. For example, Nevada law provides that all recordings of phone calls received by the LVMPD through its 911 call center are “public records” as defined by the NPRA. *See Nev. Rev. Stat. § 239.010(1); see also Sparks, Nev. City Atty. Opinion Mem., Status of Records of 911 Calls to Dispatch and Dispatch Logs as “Public Records”* (Apr. 2, 2008) (concluding that “unless an exception exists, a copy of a 911 dispatch call must be made available to a person making a proper (*i.e.*, written) request.”), <http://cityofsparks.us/wp-content/uploads/2016/12/atty-opinion-2008-7.pdf>²; *cf. LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015) (holding that records for telephones used by county jail inmates were related to the provision of a public service and thus were “public records” under the NPRA).

39. All the records requested by the Review-Journal are public records, and the LVMPD has not meet its heavy burden in establishing otherwise.

CLAIM FOR RELIEF

40. Petitioner re-alleges and incorporates by reference each and every allegation contained in Paragraphs 1-39 as if fully set forth herein.

41. Petitioner should be provided with the records it has requested pursuant to the NPRA.

42. The records sought are subject to disclosure, and Respondent has not met its burden of establishing otherwise.

43. A writ of mandamus is necessary to compel Respondent’s compliance with the NPRA.

WHEREFORE, Petitioner prays for the following relief:

1. That the Court resolve this matter on an expedited basis as mandated by Nev. Rev. Stat. § 239.011;

2. Injunctive relief ordering the LVMPD to immediately make available complete copies of all Records requested without charging fees, other than permissible fees

² Last accessed November 3, 2017.

1 should the Petitioners request copies;

2 3. Declaratory relief;

3 4. Reasonable costs and attorney's fees; and

4 5. Any further relief the Court deems appropriate.

5
6 RESPECTFULLY SUBMITTED this 6th of December, 2017.

7
8
9
10 MARGARET A MCLEATCHIE, Nevada Bar No. 10931

11 ALINA M. SHELL, Nevada Bar No. 11711

12 **MCLEATCHIE SHELL LLC**

13 701 East Bridger Ave., Suite 520

14 Las Vegas, Nevada 89101

15 Telephone: (702) 728-5300; Fax: (702) 425-8220

16 Email: maggie@nvlitigation.com

17 *Counsel for Petitioner, Las Vegas Review-Journal*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2017, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS - EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011 in *American Broadcasting Companies, Inc., et al. v. Las Vegas Metropolitan Police Department*, Clark County District Court Case No. A-17-764030-W, to be served electronically using the Odyssey File & Serve electronic filing service system, to all parties with an email address on record.

I hereby further certify that on the 6th day of December, 2017, Pursuant to Nev. R. Civ. P. 5(b)(2)(B), I mailed a true and correct copy of the foregoing AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS - EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011 by depositing the same in the United States mail, first-class postage pre-paid, to the following:

Joel E. Tasca and Justin A. Shiroff
BALLARD SPAHR LLP
100 North City Parkway, Suite 1750
Las Vegas, Nevada 89106-4617
Email: tasca@ballardspahr.com; shiroffj@ballardspahr.com
Attorneys for American Broadcasting Companies, Inc., The Associated Press, Cable News Network, Inc., Chesapeake Media I, LLC, d/b/a KSNV-TV, Los Angeles Times Communications, LLC, The New York Times Company, and WP Company LLC d/b/a The Washington Post

Craig R. Anderson, Nick D. Crosby, and Jackie V. Nichols
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, NV 89145
Email: canderson@maclaw.com; ncrosby@maclaw.com; jnichols@maclaw.com
Attorneys for Las Vegas Metropolitan Police Department

FURTHER I hereby certify that on this 6th day of December, 2017, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing

AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS - EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011 in *Las Vegas Review-Journal. v. Las Vegas Metropolitan Police Department*, Clark County District Court Case No. A-17-764169-W, to be served electronically using the Odyssey File & Serve electronic filing service system, to all parties with an email address on record.

I hereby further certify that on the 6th day of December, 2017, pursuant to Nev. R. Civ. P. 5(b)(2)(B), I mailed a true and correct copy of the foregoing AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS - EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011 by depositing the same in the United States mail, first-class postage pre-paid, to the following:

Craig R. Anderson, Nick D. Crosby, and Jackie V. Nichols
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, NV 89145
Email: canderson@maclaw.com; ncrosby@maclaw.com; jnichols@maclaw.com
Attorneys for Las Vegas Metropolitan Police Department

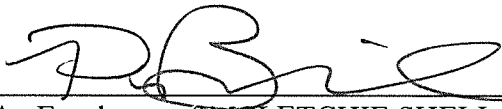
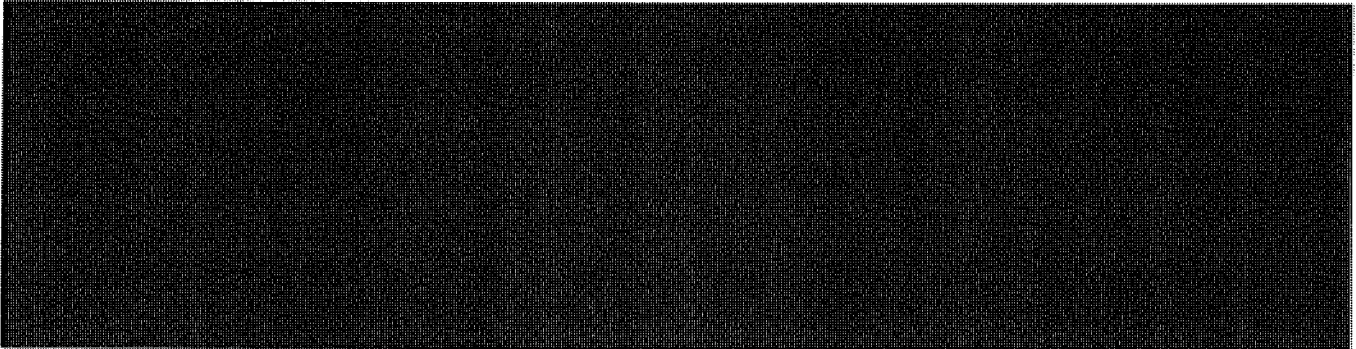

An Employee of MCLETTCHIE SHELL LLC

EXHIBIT 5



From: PIO <PIO@lvmpd.com>
Date: Wed, Oct 18, 2017 at 4:10 PM
Subject: RE: RECORDS request update
To: Arthur Kane <akane@reviewjournal.com>
Cc: Karisa King <kking@reviewjournal.com>, Anita Hassan <ahassan@reviewjournal.com>

Mr. Kane,

Please be advised that records relating to LVMPD Event No. 171001-3519 are part of an open investigation. At this time any records responsive to your request is confidential and privileged pending the outcome of the investigation. See, Donrey v. Bradshaw, 106 Nev. 360, 798 P2d 144 (1990).

Until the case is closed, the investigatory information you have requested cannot be provided.

Office of Public Information

Las Vegas Metropolitan Police Department

400-B South Martin L. King Boulevard, Las Vegas, Nevada 89106

☎ 702.828.4082 office | ☎ 702.828.1550 fax

Follow us on Facebook, Twitter and Instagram

AO

From: Arthur Kane [mailto:akane@reviewjournal.com]
Sent: Monday, October 9, 2017 4:50 PM
To: PIO <PIO@LVMPD.COM>

Cc: Karisa King <kking@reviewjournal.com>; Anita Hassan <ahassan@reviewjournal.com>
Subject: RECORDS request update

I am checking to see where our request is for dispatch logs, 911 calls and other information filed Monday Oct. 2, 2017 by my colleague Anita Hassan. Can you let me know where we are in the process of getting those documents as it's been more than five days.

thanks,

--

Thanks,

Arthur Kane

Investigative Reporter

Las Vegas Review-Journal

702-383-0286

@arthurm Kane

--

Anita Hassan

Investigative Reporter

1111 W. Bonanza Road, Las Vegas, Nevada 89106

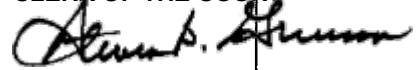
P. 702.383.4643 C.713.922.7617

LAS VEGAS

REVIEW-JOURNAL



EXHIBIT B



PTOB

MARGARET A MCLEATCHIE, Nevada Bar No. 10931

ALINA M. SHELL, Nevada Bar No. 11711

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Las Vegas, Nevada 89101

Telephone: (702) 728-5300; Fax: (702) 425-8220

Email: maggie@nvlitigation.com

Counsel for Petitioner, Las Vegas Review-Journal

DISTRICT COURT

CLARK COUNTY NEVADA

AMERICAN BROADCASTING
COMPANIES, INC.; THE ASSOCIATED
PRESS; CABLE NEWS NETWORK,
INC.; CHESAPEAKE MEDIA I, LLC,
D/B/A KSNV-TV; LOS ANGELES
TIMES COMMUNICATIONS, LLC; THE
NEW YORK TIMES COMPANY; AND
WP COMPANY LLC D/B/A THE
WASHINGTON POST,

Petitioners,

v.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

v.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

Case No.: A-17-764030-W

Dept. No.: II

**OPENING BRIEF IN SUPPORT OF
AMENDED PUBLIC RECORDS ACT
APPLICATION PURSUANT TO
NEV. REV. STAT. § 239.001/
PETITION FOR WRIT OF
MANDAMUS**

Hearing Date: January 30, 2018

Hearing Time: 9:30 a.m.

Case No.: A-17-764169-W

Dept. No.: XXVI

**OPENING BRIEF IN SUPPORT OF
AMENDED PUBLIC RECORDS ACT
APPLICATION PURSUANT TO
NEV. REV. STAT. § 239.001/
PETITION FOR WRIT OF
MANDAMUS**

Hearing Date: January 30, 2018

Hearing Time: 9:30 a.m.

///

1 COMES NOW Petitioner the Las Vegas Review-Journal by and through its
2 undersigned counsel, and hereby submits this Opening Brief in support of its Amended
3 Petition for Writ of Mandamus. This Opening Brief is supported by the attached
4 memorandum of points and authorities, any attached exhibits, and the pleadings and papers
5 on file with this Court.

6 DATED this the 8th of December, 2017.

7
8 /s/ Margaret A. McLetchie

MARGARET A MCLETCHE, Nevada Bar No. 10931

ALINA M. SHELL, Nevada Bar No. 11711

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the hours, days, and weeks after the tragic and unprecedented October 1, 2017 shooting at the Route 91 Harvest Music Festival, people across the state and around the country have turned to the Las Vegas Review-Journal (“Review Journal”) for the latest information about the victims, first responders, the shooter, and the Las Vegas Metropolitan Police Department’s (“LVMPD”) investigation of the deadliest mass shooting incident in recent American history. To provide its subscribers and readers with that information, the Review-Journal submitted a series of records requests to the LVMPD pursuant to the Nevada Public Records Act (“NPR”), Nev. Rev. Stat. § 239.001 *et seq.* to inspect public records pertinent to the LVMPD’s response to the shooting and its subsequent investigation of shooter Stephen Paddock. The LVMPD, however, has persistently ignored the Review-Journal’s requests, or stonewalled with blanket assertions of confidentiality.

Over two months after the events of October 1, 2017, there are numerous unanswered questions about the shooting and the LVMPD’s investigation, including questions about the chronology of events on the night of the shooting, law enforcement’s response to the shooting, the full extent of the evidence law enforcement recovered from Mr. Paddock’s hotel room at the Mandalay Bay Hotel and Casino, his home in Mesquite, and his home in Reno, Nevada.¹ Many of these questions could be answered by the release of the public records the Review-Journal has requested. The LVMPD’s failure to provide records that could answer some of the public’s questions contravenes the letter and the intent of the NPR to “foster democratic principles by providing members of the public with access to inspect and copy public books and records[.]” Nev. Rev. Stat. § 239.001(1). Government

¹ See <https://www.reviewjournal.com/crime/shootings/questions-remain-in-las-vegas-strip-shooting-investigation/> (October 27, 2017 article detailing questions about the shooting investigation) (last accessed December 6, 2017); see also <https://www.reviewjournal.com/crime/shootings/how-the-fbi-and-atf-are-aiding-the-las-vegas-shooting-investigation/> (detailing how federal investigative agencies are assisting LVMPD in investigating the October 1 mass shooting) (last accessed December 6, 2017).

transparency is more important—not less important—in the aftermath of a tragedy. As the United States Supreme Court has explained:

When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the *open processes* of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.

Richmond Newspapers v. Virginia, 448 U.S. 555, 571 (1980) (emphasis added). Here, the Las Vegas community deserves access to information about the events October 1.

To provide the public with the information it deserves and to fulfill the NPRA’s important purpose, the Review-Journal requests that this Court grant:

- Injunctive relief ordering the LVMPD to immediately make available complete copies of all requested records or make the requested records available for inspection;
- Declaratory relief;
- Reasonable attorney’s fees and costs as required by Nev. Rev. Stat. § 239.011(2); and
- Any other relief this Court deems appropriate.

The Review-Journal also requests that this Court handle this matter on an expedited basis. This is vital because the NPRA provides for expeditious access to public records (Nev. Rev. Stat. § 239.011(2)), and because this case also implicates the First Amendment right of the media to report on public tragedies.

II. FACTS AND PROCEDURAL HISTORY

A. The Review-Journal’s October 2, 2017 Requests and the LVMPD’s Response

As detailed in the Petition submitted to this Court on November 3, 2017, and the Amended Petition submitted on December 6, 2017, since October 2, 2017, the Review-Journal sent a series public records requests. On October 2, 2017, hours after the shooting, the Review-Journal sent the LVMPD a request pursuant to the NPRA requesting:

- A log and/or call slips of any and all emergency calls received on Sunday October 1 between 8 p.m. and 2 a.m. regarding calls for service between the 3800 and 4000 blocks of South Las Vegas Blvd, including but not limited to time stamps, origin/location and address of the originating call, reason for the call, police patrol units dispatched including the patrol unit numbers, patrol unit substation and time of dispatch and time of arrival; and

- A log and/or call slips of any and all emergency calls received on Sunday October 1 between 8 p.m. and 2 a.m. regarding calls for service between the 3800 and 4000 blocks of South Las Vegas Blvd, including but not limited to time stamps, origin/location and address of the originating call, reason for the call, fire and ambulance units dispatched including, unit numbers and time of dispatch and time of arrival.

(Exhibit (“Exh.”) 1 to Petition.) The Review-Journal also sent the LVMPD requests pursuant to the NPRA for recordings of 911 calls for service received on October 1, 2017 between 8:00 p.m. and 2:00 a.m. between the 3800 and 4000 blocks of South Las Vegas Blvd. (Exh. 2 to Petition.) Another reporter for the Review-Journal also sent a separate request for any and all 911 calls relating to the shooting at the Route 91 Harvest Music Festival. (Exh. 3 to Petition.)

On October 9, 2017, after receiving no response to its October 2, 2017 records request, the Review-Journal contacted the LVMPD for an update. (Exh. 4 to Petition.) The LVMPD did not respond to the Review-Journal’s records requests until October 18, 2017—twelve business days after receiving the October 2, 2017 requests. (Exh. 5 to Petition.) In its response, the LVMPD refused to provide any of the records in the Review-Journal’s request, claiming that because the records are purportedly “part of an open investigation” they are “confidential and privileged pending the outcome of the investigation.” (*Id.*) LVMPD cited *Donrey v. Bradshaw*, 106 Nev. 360, 798 P2d 144 (1990) as authority for its refusal. (*Id.*)

B. The Review-Journal’s October 15, 2017 Request and the LVMPD’s Failure to Respond.

On October 15, 2017, the Review-Journal sent the LVMPD a records request pursuant to the NPRA requesting “[p]urchase orders for any emergency purchases on or after Oct. 1, 2017;” and “[c]opies of any emergency, no-bid contracts entered on or after Oct. 1, 2017.” (Exh. 6 to Petition.) The LVMPD has never responded to this request.

C. The Review-Journal’s November 30, 2017 Request and the LVMPD’s Response.

On November 30, 2017, the Review-Journal sent the LVMPD a records request pursuant to the NPRA requesting “an opportunity to inspect or obtain copies of any and all documents that reflect any weapons obtained through the course of the Oct. 1, 2017 Las

Vegas mass shooting investigation that are suspected to have belonged to mass shooter Stephen Paddock.” (Exh. 7 to Amended Petition, p. 2.) The request specifically encompassed “any returns on search warrants and any documents reflecting any other weapons obtained through the course of the investigation, either in Paddock’s various properties—including but not limited to his car, his Reno home and his Mesquite homes—and any other places or properties he stayed at or had connections to, including but not limited to his Mandalay Bay corner suite.” (*Id.*)

The LVMPD responded to the Review-Journal’s November 30, 2017 records request by letter on November 30, 2017. (Exh. 8 to Amended Petition.) In its response, the LVMPD stated in conclusory fashion that the requested records are “the subject of an ongoing investigation/criminal case, and cannot be released without jeopardizing the criminal case.” (*Id.*) The LVMPD did not, however, explain how the release of the requested records would jeopardize its investigation. The LVMPD further stated that it was denying the Review-Journal’s request because the “requested record is not a public record under NRS 239.010(1), and because the records are protected by the “law enforcement privilege.” (*Id.*) The LVMPD also cited *Donrey* as an additional basis for nondisclosure. (*Id.*) The LVMPD stated that although it is leading the investigation, other law enforcement agencies, including the Federal Bureau of Investigation (“FBI”), may be in possession of records related to the Review-Journal’s request. (*Id.*, p. 2.) The LVMPD also indicated in a separate November 30, 2017 email to the Review-Journal that it should refer its records request to the FBI. (Exh. 9 to Amended Petition.)

D. The Review-Journal Files Suit

On November 3, 2017, the Review-Journal filed a Petition for Writ of Mandamus with this Court pursuant to Nev. Rev. Stat. § 239.011. Subsequently, on November 7, 2017, the Review-Journal filed a motion to consolidate this matter with another case initiated by several other media outlets in *American Broadcasting Companies, Inc. et al. v. Las Vegas Metropolitan Police Department*, Eighth Judicial District Court Case No. A-17-764030-W.

On December 6, 2017, the Review-Journal filed an Amended Petition in this matter to include the LVMPD's response to its November 30, 2017 records request.

III. ARGUMENT

Pursuant to the NPRA, all governmental records are presumed to be public unless explicitly deemed confidential by law. Nev. Rev. Stat. § 239.010. To overcome that presumption, a governmental entity seeking to withhold public records "has the burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential." Nev. Rev. Stat. § 239.0113(2). The NPRA further mandates, if a governmental entity intends to withhold records on the basis of confidentiality, it must, within five business days, provide written notice of that fact and "[a] citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential." Nev. Rev. Stat. § 239.0107(1)(d)(1) and (2). In this case, the LVMPD has not met its burden of proving that the withheld records are confidential. Moreover, the LVMPD did not provide timely notice of the legal bases for its assertion that the records requested on October 2, 2017 are confidential, and has completely failed to respond to the Review-Journal's October 15, 2017 request. Thus, LVMPD has waived its right to assert that privilege attaches to any of the withheld records.

A. The NPRA Starts from the Presumption that Public Records Must Be Open; The LVMPD Bears a Heavy Burden in Overcoming that Presumption.

The NPRA sets forth that public records are to be made available to the public for inspection or copying. Nev. Rev. Stat. § 239.010(1); *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 628 (2011). The purpose of the NPRA is to "foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law[.]" Nev. Rev. Stat. § 239.001(1). To that end, the NPRA must be construed liberally; government records are presumed public records subject to the act, and any limitation on the public's access to public records must be construed narrowly. Nev. Rev. Stat. 239.001(2) and 239.001(3); *see also Gibbons*, 127 Nev. at 882, 266 P.3d at 629 ("the provisions of the NPRA place an unmistakable emphasis on

1 *disclosure*”) (emphasis added).

2 The NPRA provides that a governmental entity must provide a meaningful response
3 to a request for public records within five (5) days of a request.² If a governmental entity
4 refuses to provide part or all of a request on the grounds that it is confidential, the NPRA
5 states that, within five (5) business days of receiving a request, the governmental entity must
6 provide written notice of that fact and a citation to the specific statute or other legal authority
7 that makes the public book or record, or a part thereof, confidential. Nev. Rev. Stat. §
8 239.0107(1)(d).

9 If a statute explicitly makes a record confidential or privileged, the public entity need
10 not produce it. *Id.* A governmental entity seeking to withhold or redact records on some other
11 basis, however, has a heavy burden: it must prove by a preponderance of evidence that the
12 records are confidential or privileged *and* that the interest in nondisclosure outweighs the
13 strong presumption in favor of public access. *See, e.g., Gibbons*, 127 Nev. at 880, 266 P.3d
14 at 628 (citation omitted).

15 In the *Gibbons* case, the Supreme Court analyzed the NPRA, surveyed its prior
16 cases, and set forth the applicable steps and burdens a withholding entity must satisfy to
17 withhold records:

18 First, we begin with the presumption that all government-generated records
19 are open to disclosure. [] The state entity therefore bears the burden of
20 overcoming this presumption by proving, by a preponderance of the
21 evidence, that the requested records are confidential. [] Next, in the absence
22 of a statutory provision that explicitly declares a record to be confidential,
any limitations on disclosure must be based upon a broad balancing of the
interests involved, [], and the state entity bears the burden to prove that its
interest in nondisclosure clearly outweighs the public's interest in access. []

23 *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citations omitted)³. Thus, as noted above, in
24 addition to first establishing by a preponderance of the evidence that the records are

25
26 ² See Nev. Rev. Stat. § 239.0107(1)(a)-(d).

27 ³ In *Gibbons*, the Supreme Court ordered disclosure of a log of emails from Governor Jim
28 Gibbons to specific individuals. 127 Nev. at 884, 266 P.3d at 630 (2011).

confidential, LVMPD also bears the burden in this case of establishing that the interest in withholding documents outweighs the interest in disclosure pursuant to the balancing test first articulated in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990);⁴ see also *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) ("Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests.")⁵.

And, in applying the *Donrey* balancing test, the burden remains squarely on the governmental entity:

In balancing the interests . . . , the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference . . . The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.

Id. (quoting from *MacEwan v. Holm*, 226 Or. 27, 46, 359 P.2d 413, 422 (1961)⁶ and citing *Donrey*, 106 Nev. at 635–36, 798 P.2d at 147–48). Moreover, at every step of this analysis, privileges and limitations on disclosure must be construed narrowly. *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 ("It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly"); see also Nev. Rev. Stat. § 239.001(3) (requiring that any limitation on the public's access to public records "must be construed narrowly"). Further, if a public record contains confidential or privileged information only in part, in response to a request for access to the record, a governmental entity shall redact the confidential information and produce the record in redacted form. Nev.

⁴ Ordering disclosure of records pertaining to a criminal investigation of dismissal of charges against a suspect. 106 Nev. 636, 798 P.2d 148 (1990).

⁵ Ordering disclosure of records documenting the use of county provided cell phones. 116 Nev. at 628-629, 6 P.3d at 473 (2000).

⁶ Oregon Supreme Court ordering production of records regarding nuclear radiation sources. 226 Or. at 49, 359 P.2d at 423 (1961).

Rev. Stat. § 239.010(3).

Finally, a governmental entity cannot rely on conjecture or hypothetical concerns to justify nondisclosure of public records. *DR Partners v. Bd. of County Com'rs of Clark County*, 116 Nev. 616, 628, 6 P.3d 465, 472–73 (2000) (County cannot meet “its burden by voicing non-particularized hypothetical concerns”) (citation omitted); *see also Reno Newspapers v. Sheriff*, 126 Nev. 211, 219, 234 P.3d 922, 927 (2010) (“A mere assertion of possible endangerment does not ‘clearly outweigh’ the public interest in access to these records.”) (quotation omitted).

B. The LVMPD Has Waived Its Ability to Assert Any Privilege It Did Not Timely Assert.

As a preliminary matter, the Review-Journal asserts that by failing to assert any claim of confidentiality within five days as required by Nev. Rev. Stat. § 239.0107(1)(d), the LVMPD has waived its right to assert that privilege attaches to any of the requested documents based on a statute or other legal authority regarding the October 2, 2017 and October 15, 2017 requests. The Review-Journal also asserts that the LVMPD’s failure to respond evidences bad faith.

The NPRA provides that a governmental entity must provide timely and specific notice if it is denying a request because the entity determines the documents sought are confidential. Specifically, Section 239.0107(1) of the NPRA outlines the actions a governmental entity may take in responding to a public records request:

1. ***Not later than the end of the fifth business day*** after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a written or oral request from a person to inspect, copy or receive a copy of the public book or record, a governmental entity shall do one of the following, as applicable:

(a) Except as otherwise provided in subsection 2, allow the person to inspect or copy the public book or record or, if the request is for the person to receive a copy of the public book or record, provide such a copy to the person.

(b) If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:

(1) Notice of that fact; and

(2) The name and address of the governmental entity that has legal custody or control of the public book or record, if known.

1 (c) Except as otherwise provided in paragraph (d), if the governmental
2 entity is unable to make the public book or record available by the end of
3 the fifth business day after the date on which the person who has legal
4 custody or control of the public book or record received the request, provide
5 to the person, in writing:

6 (1) Notice of that fact; and

7 (2) A date and time after which the public book or record will be
8 available for the person to inspect or copy or after which a copy of the public
9 book or record will be available to the person. If the public book or record
10 or the copy of the public book or record is not available to the person by
11 that date and time, the person may inquire regarding the status of the
12 request.

13 (d) ***If the governmental entity must deny the person's request because
14 the public book or record, or a part thereof, is confidential, provide to the
15 person, in writing:***

16 (1) ***Notice of that fact; and***

17 (2) ***A citation to the specific statute or other legal authority that
18 makes the public book or record, or a part thereof, confidential.***

19 (emphases added). Thus, an entity that withholds records must provide timely and specific
20 notice—and must do so within five (5) business days.

21 The Eighth Judicial District Court has held, on two separate occasions, that when a
22 government agency fails follow this mandate, it is thereby barred from raising any non-cited
23 statute or legal authority in responding to a filed lawsuit. First, in *Las Vegas Review-Journal*
24 *v. Clark County School District*, Eighth Judicial Dist. Ct. Case No. A-17-750151-W, the
25 Clark County School District failed to timely respond to requests and failed to assert any
26 claims of confidentiality within the period mandated by Nev. Rev. Stat. § 239.0107(d) in
27 response to a request from the Review-Journal seeking records about Trustee Kevin Child.
28 (Exh. 1, p. 2, ¶ 1. at ¶ 4.) In granting the Review-Journal's petition for a writ of mandamus,
the district court cited this failure to timely assert any claim of confidentiality as a basis for
its determination that CCSD had failed to meet its burden of demonstrating the existence of
any claim of confidentiality that justified withholding the requested records. (*Id.*, p. 6, ¶ 29.)

Second, in *Las Vegas Review-Journal v. Clark County Office of the*
Coroner/Medical Examiner, Eighth Judicial Dist. Ct. Case No. A-17-758501-W, the
Review-Journal sent a public records request to the Coroner's Office requesting copies of
certain autopsy reports (Exh. 2, p. 2, ¶ 1.) Although the Coroner's Office timely responded,

1 it failed to cite binding legal authority within five (5) days as required. The Court explained
2 that the Coroner’s Office “cannot rely on privileges, statutes, or other authorities that it failed
3 to assert within five (5) business days to meet its burden of establishing that privilege attaches
4 to any of the requested records.” (*Id.* at p. 9, ¶ 33; *see also* ¶ 49. While these district court
5 orders are not binding precedent, they are nevertheless instructive.

6 In this case, as set forth above, the Review-Journal submitted three records requests
7 to the LVMPD on October 2, 2017 for public records pertaining to LVMPD’s response to
8 the October 1 shooting, including 911 calls, logs, and call slips. (*See* Exhs. 1, 2, and 3 to
9 Petition.) When the LVMPD had not responded within the five business days mandated by
10 Nev. Rev. Stat. § 239.0107(1)(d), the Review-Journal sent an email to the LVMPD to inquire
11 regarding the status of one of the October 2 requests for call logs and related documentation.
12 (Exh. 4 to Petition.) The LVMPD eventually responded on October 18, 2017—seven
13 business days after it should have responded under § 239.0107(1)(d). (Exh. 5 to Petition.)
14 Because it failed to respond to the records request in the time and manner prescribed by the
15 NPRA, the LVMPD has waived the ability to rely on legal authority it failed to timely assert.

16 Moreover, the LVMPD has never responded to the Review-Journal’s October 15,
17 2017 records request for purchase orders for emergency purchases and copies of emergency,
18 no-bid contracts the LVMPD entered into on or after the date of the shooting. Thus, the
19 LVMPD has waived the right to rely on any legal authority to justify withholding the
20 requested public records and should be directed to release those records immediately.

21 Because the LVMPD did not respond, within five business days of receiving the
22 NPRA requests from the Review-Journal, with specific statutory citation or other legal
23 authority to justify withholding records, under the plain language of the statute and the
24 authorities above, it is precluded from relying on any such previously uncited authorities
25 herein.

26 ///

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28 ///

1 **C. The LVMPD Has Failed to Demonstrate By a Preponderance of the Evidence**
2 **That the Requested Records Are Confidential.**

3 Even when it did respond, the LVMPD failed to meet its obligation of specifically
4 explaining the bases of its denials. *See Nev. Rev. Stat. § 239.0107 (1)(d)* (requiring that,
5 within five (5) days, a governmental entity denying records provide “[a] citation to the
6 specific statute or other legal authority that makes the public book or record, or a part thereof,
7 confidential”). Thus, it did not meet its heavy burden in overcoming the presumption in favor
8 of access—and it acted in bad faith.

9 While the LVMPD has now asserted that there is an ongoing criminal investigation
10 (*see* Exh. 8 to Amended Petition), it has failed to establish how release of the requested
11 records would jeopardize that investigation. As noted above, the mere assertion that the
12 dissemination of public records *might*, hypothetically, affect an investigation does not suffice
13 to meet the heavy burden the LVMPD bears in demonstrating that these public records should
14 be kept confidential. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *Reno Newspapers v. Sheriff*,
15 126 Nev. at 219, 234 P.3d at 927 (finding that the Reno Sheriff’s assertion that release of
16 records relating to concealed firearms permits might increase the vulnerability of permit
17 holders did not satisfy his burden of proof to show that the government interest clearly
18 outweighs the public’s right to access).

19 **1. The LVMPD Has Not Established That the Requested 911 Calls and Call Logs**
20 **Are Not Subject to Disclosure.**

21 Although the Nevada Supreme Court has not yet been asked to address the specific
22 application of the NPRA to 911 calls, they are not expressly confidential by law and, thus,
23 the public is presumptively entitled to access. *Nev. Rev. Stat. § 239.010(1)*; *Gibbons*, 127
24 Nev. at 880, 266 P.3d at 628 (“we begin with the presumption that *all* government-generated
25 records are open to disclosure”) (emphasis added).

26 ///

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The LVMPD’s cursory reliance on *Donrey*—which merely sets forth a balancing test—does not support nondisclosure of these public records. As noted above, none of the factors set forth in *Donrey* as potentially supporting nondisclosure⁷ are present in this case.

Precedent from other states’ courts, across the nation, demonstrate that the 911 calls and related documentation are public records to which the public is strongly presumed to have access. As the Ohio Supreme Court has observed, 911 calls are not prepared by attorney or law enforcement officials; instead, they “are routinely recorded without any specific investigatory purpose in mind” and therefore are not “confidential law enforcement investigatory records.” *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 1996-Ohio-214, 75 Ohio St. 3d 374, 378, 662 N.E.2d 334, 337 (1996). “Moreover, because 911 calls generally precede offense or incident form reports completed by the police, they are even further removed from the initiation of the criminal investigation than the form reports themselves.” *Id.*

Further, the Ohio Supreme Court observed that the fact that 911 calls later come into the possession or control of law enforcement does not affect their status as public records: “Once clothed with the public records cloak, the records cannot be defrocked of their status.” *Id.* (citation omitted); *see also Meredith Corp. v. City of Flint*, 256 Mich. App. 703, 708–709, 671 N.W.2d 101, 104–105 (2003) (affirming district court ruling that 911 calls were public records under the Michigan Freedom of Information Act); *Asbury Park Press v. Lakewood Twp. Police Dept.*, 354 N.J. Super. 146, 161-63, 804 A.2d 1178, 1187 (2002) (construing New Jersey’s former Right to Know Law to determine that the tape of a 911 call constituted a public record and thus was available to the public because it did not fall into one of the exceptions articulated in the law); *Serrano v. S. Brunswick Twp.*, 358 N.J. Super. 352, 367, 817 A.2d 1004, 1013 (App. Div. 2003) (holding that a recording of a 911 call was a public record under New Jersey’s Open Records Act); *State ex rel. Milwaukee Police Ass’n v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190 (2000)

⁷ While LVMPD relies on *Donrey*, the Court ordered disclosure in that case. 106 Nev. 636, 798 P.2d 148 (1990).

1 (assuming *sub silentio* that 911 calls are public records); *State v. Gray*, 741 S.W.2d 35, 38
2 (Mo. App. 1987) (911 tape was a public record); *cf. State v. Cain*, 223 Conn. 731, 741, 613
3 A.2d 804, 809 (1992) (“Since tape recordings of 911 calls are public records, they are subject
4 to the regulations regarding preservation and disposition of such records promulgated by the
5 public records administrator”) (*abrogated on other grounds by State v. Courchesne*, 262
6 Conn. 537, 816 A.2d 562 (2003)).

7 When individuals at the Route 91 Harvest Music Festival placed calls to 911, those
8 calls were not part of an investigation; they were calls for assistance made by citizens. The
9 moment those calls were made, the calls and relating documentation became public records.
10 The mere fact that the LVMPD and other law enforcement agencies are now investigating
11 the incident does not affect the public nature of the calls.

12 In sum, the LVMPD has not met its heavy burden to establish that the requested records
13 are confidential, and the interests in disclosure outweigh any hypothetical claims of
14 confidentiality. Accordingly, the 911 calls and related documentation that the LVMPD has
15 should be produced.

16 **2. The LVMPD Has Not Established that Search Warrant Returns and Related**
17 **Records Should Not Be Disclosed.**

18 As with the 911 calls and supporting documentation, the LVMPD has not
19 established that any interest in confidentiality outweighs the public’s presumptive right of
20 access to the search warrant returns and related documents in its possession.

21 In the context of unsealing court records, other courts have ordered production of
22 warrant records unsealed. *See, e.g., In re Search Warrant for Secretarial Area Outside Office*
23 *of Gunn*, 855 F.2d 569, 572-74 (8th Cir. 1988) (“Gunn”) (recognizing First Amendment right
24 of access to search warrant affidavits and other materials supporting search warrant
25 applications); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989) (recognizing
26 common law right of access to search warrant records); *In re Newsday*, 895 F.2d 74, 79 (2d
27 Cir. 1990) (same); *In re Search Warrants Issued in Connection with Investigation of Death*
28 *of Michael Jackson*, No. A-09-601140-C, slip op. at 2 (Nev. Dist. Ct., Clark Cty. Nov. 20,

2009) (“Jackson”) (unsealing search warrant and affidavit during criminal investigation into Michael Jackson’s death).

In a case dealing with another high-profile mass shooting, *United States v. Loughner*, 769 F. Supp. 2d 1188 (D. Ariz. 2011), the United States District Court for the District of Arizona ordered the unsealing of warrant affidavits even though the investigation had not concluded. The court found that once the investigation into the identity of the only responsible party was effectively completed, “[t]here [was] no real danger at [that] point that disclosure of the warrant materials [would] jeopardize the investigation.” *Id.* at 1191. The court also observed that there was both a tradition of providing public access to such records in such circumstances, and a strong public function performed by providing access: “Public scrutiny of the search warrant process . . . can shed light on how and why a warrant was obtained, and thereby further the public’s interest in understanding the justice system.” *Id.* at 1194. “Permitting inspection of the search warrants [and] the accompanying affidavits . . . will further public understanding of the response of government officials,” and “allow the public to judge whether law enforcement functioned properly and effectively[.]” *Id.*

Likewise, here, the production of the records pursuant to the NPRA will further public understanding of the events of October 1—including allowing the public an opportunity to evaluate the response of the LVMPD. The LVMPD has failed to timely demonstrate the applicability of any claim of confidentiality, let alone that any interest in withholding the records outweighs the important interest to be served by public access—and the presumption that the public have access to its own records. The LVMPD’s conclusory and unsupported assertion that the warrant materials are not public records pursuant to Section 239.010(1) (Exh. 8 to Amended Petition, p. 1) is woefully lacking in specificity.⁸ It is neither the Review-Journal’s nor this Court’s job to divine which statutory exception the LVMPD believes exempts the records from disclosure; the LVMPD was required to provide

⁸ That provision of the NPRA lists literally dozens and dozens of statutory exceptions to the NPRA. *See* Nev. Rev. Stat. § 239.010(1), none of which is applicable—and the LVMPD was required to specify its basis for confidentiality in any case (at the time of refusal).

1 timely citation to *the specific statutory authority* which renders the records confidential. Nev.
2 Rev. Stat. § 239.0107(1)(d).

3 The LVMPD also asserts that release of the requested records would “jeopardize”
4 its ongoing investigation. Yet again, however, the LVMPD fails to offer any explanation of
5 *how* dissemination of these public records would impact its investigation. Indeed, LVMPD
6 has already publicly disclosed that a veritable arsenal of firearms and explosive devices were
7 found upon searching Paddock’s hotel room, car and homes; moreover, many of the search
8 warrant inventories have been publicly disclosed by this Court’s clerk’s office. Thus,
9 LVMPD has no legal basis to withhold such records. And yet again, the LVMPD cannot rely
10 on hypotheticals or conjecture to justify its refusal to disclose these records.

11 **D. The LVMPD Should Provide a Privilege Log of the Documents It is**
12 **Withholding.**

13 As the Nevada Supreme Court observed in *Gibbons*, after the commencement of a
14 lawsuit pursuant to the NPRA, to continue to support the claims it asserted, a state entity
15 withholding requested records is generally required to provide the requesting party with a
16 log which details the records and sufficient information about the bases for withholding.
17 *Gibbons*, 127 Nev. at 882-83, 266 P.3d at 629; *see also id.* at 883 (“[A] claim that records
18 are confidential can only be tested in a fair and adversarial manner, and in order to truly
19 proceed in such a fashion, a log typically must be provided to the requesting party”).
20 Accordingly, while the Review-Journal contends that the LVMPD has failed to timely meet
21 its burden, should it continue to withhold records, it must produce a log identifying the
22 documents being withheld and setting forth the specific bases for withholding so that the
23 Review-Journal has a meaningful opportunity to contest—and this Court has an adequate
24 foundation to review—the propriety of the withholding.

25 **E. This Matter Should Be Expedited, and the Media Should Be Provided With**
26 **Records Without Delay.**

27 The legislative intent underpinning the NPRA is to foster democratic principles by
28 ensuring easy *and expeditious* access to public records. Nev. Rev. Stat. § 239.001(1); *see*
also Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011)

(holding that “the provisions of the NPRA are designed to promote government transparency and accountability”). Indeed, the importance of access—and specifically, speedy access—is reflected in the NPRA’s mandate that courts prioritize public records matters. Nev. Rev. Stat. § 239.001(2) (“The court shall give this matter priority over other civil matters to which priority is not given by other statutes...”).

Not only does the NPRA reflect a mandate favoring access, a specific legislative interest in **swift** disclosure is woven throughout the NPRA. For example, Nev. Rev. Stat. § 239.0107(1) mandates that, by not later than the end of the fifth business day after receiving a records request, a governmental entity must either (1) make the records available; (2) if they entity does not have custody of the requested records, notify the requester of that fact and direct them to the appropriate government entity; (3) if the records are not available by the end of the fifth business day, provide notice of that fact and a date when the records will be available; or (4) if the records or any part of the records are confidential, provide the requestor with notice of that fact and a citation to the statute or law making the records confidential. Nev. Rev. Stat. § 239.0107(1)(a)-(d).

In addition to this timely notification and disclosure scheme, the NPRA specifically provides for expedited court consideration of a governmental entity’s denial of a records request. Nev. Rev. Stat. § 239.011(2) (mandating that a court give an application for public records “priority over other civil matters”).) Thus, the NPRA is designed to provide quick access to withheld public records, not to reward non-compliance or delay. Further, the NPRA specifically provides that the public has a presumptive right of access to public records. *See* Nev. Rev. Stat. § 239.001(1). The continued withholding of the requested records violates that right.

Additionally, the continued withholding of the requested documents thwarts one of the central roles of journalism: publicizing information about issues that affect the public interest. Finally, the denial of access to public records impinges on the media’s First Amendment rights to access public records and report on them—and any violation of a First Amendment right is irreparable harm. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d

1 497, 507 (1st Cir. 1989) (“even a one to two day delay impermissibly burdens the First
2 Amendment”); *see also* *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110,126-27 (2d Cir.
3 2006) (“Our public access cases and those in other circuits emphasize the importance of
4 immediate access where a right of access is found.”) (emphasis added) (citations omitted));
5 *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (public
6 access to documents in court’s file “should be immediate and contemporaneous”).

7 **IV. CONCLUSION**

8 For all the reasons set forth above, the Review-Journal respectfully requests that
9 this Court grant the relief requested in the Petition:

10 1. That the court handle this matter on an expedited basis as mandated
11 by Nev. Rev. Stat. § 239.011;

12 2. Injunctive relief ordering the LVMPD to immediately make
13 available complete copies of all requested records or make the records available for
14 inspection;

15 3. Declaratory relief;

16 4. Reasonable costs and attorney’s fees;

17 5. A finding that the LVMPD acted in bad faith; and

18 6. Any further relief the Court deems appropriate.

19 Respectfully submitted this the 8th day of December, 2017.

21 /s/ Margaret A. McLetchie

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Counsel for Petitioner, Las Vegas Review-Journal

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2017, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing OPENING BRIEF IN SUPPORT OF AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS in *American Broadcasting Companies, Inc., et al. v. Las Vegas Metropolitan Police Department*, Clark County District Court Case No. A-17-764030-W, to be served electronically using the Odyssey File & Serve electronic filing service system, to all parties with an email address on record.

I hereby further certify that on the 8th day of December, 2017, Pursuant to Nev. R. Civ. P. 5(b)(2)(B), I mailed a true and correct copy of the foregoing OPENING BRIEF IN SUPPORT OF AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS by depositing the same in the United States mail, first-class postage pre-paid, to the following:

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FURTHER I hereby certify that on this 8th day of December, 2017, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing

OPENING BRIEF IN SUPPORT OF AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS in *Las Vegas Review-Journal v. Las Vegas Metropolitan Police Department*, Clark County District Court Case No. A-17-764169-W, to be served electronically using the Odyssey File & Serve electronic filing service system, to all parties with an email address on record.

I hereby further certify that on the 8th day of December, 2017, pursuant to Nev. R. Civ. P. 5(b)(2)(B), I mailed a true and correct copy of the foregoing OPENING BRIEF IN SUPPORT OF AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR WRIT OF MANDAMUS by depositing the same in the United States mail, first-class postage pre-paid, to the following:

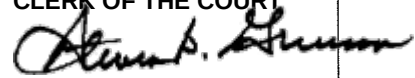
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**OPENING BRIEF IN SUPPORT OF AMENDED PUBLIC RECORDS ACT
APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/ PETITION FOR
WRIT OF MANDAMUS**

Exhibit	Description	Dated
1	Order Granting Writ of Mandate in <i>Las Vegas Review-Journal v. Clark County School District</i> , Case No. A-17-750151-W.	02/22/2017
2	Order Granting Petitioner LVRJ's Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.001/ Petition for Writ of Mandamus in <i>Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner</i> , Case No. A-17-758501-W.	11/09/2017

EXHIBIT C



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DISTRICT COURT

CLARK COUNTY, NEVADA

AMERICAN BROADCASTING COMPANIES,
INC.; THE ASSOCIATED PRESS; CABLE
NEWS NETWORK, INC.; CHESAPEAKE
MEDIA I, LLC, D/B/A KSNV-TV; LOS
ANGELES TIMES COMMUNICATIONS,
LLC; THE NEW YORK TIMES COMPANY;
AND WP COMPANY LLC D/B/A THE
WASHINGTON POST,

Petitioners,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

Case No.: A-17-764030-W

Consolidated Case No.: A-17-764169-W

Dept. No.: 2

**RESPONDENT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S
OPPOSITION TO PETITIONER LAS VEGAS REVIEW JOURNAL'S PUBLIC
RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001 /
PETITION FOR WRIT OF MANDAMUS**

EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.001

1 Respondent Las Vegas Metropolitan Police Department (“LVMPD” or the
2 “Department”), by and through its attorney of record Nicholas Crosby, Esq. and Jackie Nichols,
3 Esq. of Marquis Aurbach Coffing, hereby files its Opposition to Petitioner Las Vegas Review
4 Journal’s Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.001 / Petition for
5 Writ of Mandamus (Expedited Matter Pursuant to Nev. Rev. Stat. § 239.001). This Opposition is
6 made and based upon the papers and pleadings on file herein, the Memorandum of Points and
7 Authorities, and any oral argument allowed by the Court at a hearing on this matter.

8 **MEMORANDUM OF POINTS & AUTHORITIES**

9 **I. INTRODUCTION**

10 Less than 24-hours after tragedy struck in Las Vegas, LVRJ began its onslaught of public
11 record requests. On October 2nd, LVRJ made three separate requests for 911 records regarding
12 the 1 October Massacre. Understandably, and as recognized by the Federal Government and
13 LVRJ’s own reporters, the Department placed “all hands on deck” in the first few weeks of the
14 investigation. With due time, the Department was able to respond to LVRJ’s various records
15 request and explained that there remained an ongoing criminal investigation and such records
16 could not be released until the investigation concluded. Not only are these records subject to an
17 ongoing investigation, but are also protected by the personal privacy exemption enumerated in
18 FOIA and other states public records laws. Furthermore, the purchase order and no-bid contracts
19 may reveal investigative techniques in how the Department responds to such crises.

20 Over a month later, LVRJ requested documents related to search warrant records,
21 specifically pertaining to Paddock’s firearms. Notably, LVRJ and the other Petitioners in this
22 matter have already sought to unseal related search warrant records in another matter before the
23 Honorable Judge Cadish. As such, this Court should not address LVRJ’s request. Nonetheless,
24 such records are not public records and Petitioners do not enjoy either a First Amendment right
25 or common law right to such records during an on-going criminal investigation.

26 In sum, the Court should deny LVRJ’s records request in its entirety because the records
27 are confidential due to the on-going criminal investigation, are an unwarranted invasion to
28 personal privacy, may reveal investigative strategy and tactics, and are not public records.

1 **II. STATEMENT OF FACTS**

2 On October 1, 2017, Las Vegas suffered the deadliest mass shooting in this nation's
3 history (hereinafter "1 October Massacre"). As we all know, Stephen Paddock ("Paddock") fired
4 rounds from a 32nd floor hotel room at the Mandalay Bay, directed at the Route 91 Harvest
5 Festival country concert that was taking place across the Las Vegas Boulevard. Ultimately,
6 Paddock killed 58 people, including one of the Department's own, Charles Hartfield, and injured
7 over 500 others. For approximately a week and a half, the Department took an "all hands on
8 deck" approach in handling the criminal investigation into the 1 October Massacre. There is no
9 doubt about the amount of time and manpower the on-going investigation initially required. In
10 fact, the Federal Government commended the Department's efforts and agreed to give the
11 Department \$1 million to assist with offsetting the significant overtime costs associated with the
12 criminal investigation.¹

13 **A. THE OCTOBER 2ND PUBLIC RECORDS REQUEST.**

14 Just hours after this horrific event unfolded, the Las Vegas Review Journal ("LVRJ")
15 wasted no time in requesting all logs and 911 calls related to the 1 October Massacre regarding
16 the responding police patrol units and fire and ambulance units. *See* Amended Petition for Writ
17 of Mandamus on file herein at **Exhibit 1**. Although LVRJ requested to inspect or receive copies
18 of the documents, it did not describe the medium or method in which it would have like to
19 receive the documents. *Id.* Despite acknowledging that the Department's "officers [were] . . .
20 very busy working the shooting" and realizing "a lot is going on," LVRJ continued to pursue its
21 public records request on two additional occasions—all less than 24-hours from the time the
22 incident took place. *Id.* at **Exhibits 2 & 3**. On October 9, 2017, LVRJ followed up on its initial
23 request. *Id.* at **Exhibit 4**.

24 **B. THE OCTOBER 15TH PUBLIC RECORDS REQUEST.**

25 On October 15, 2017, LVRJ requested copies of the following documents:

26 ¹ *See* USA Today: Las Vegas Shooting: Trump pledges \$1 million to Las Vegas law enforcement after
27 shooting. <https://www.usatoday.com/story/news/politics/2017/10/11/trump-pledges-1-million-las-vegas-law-enforcement-after-mass-shooting/755452001/> (dated October 11, 2017) (last accessed January 8,
28 2018).

- Purchase orders for any emergency purchases on or after Oct. 1, 2017
- Copies of any emergency, no-bid contracts entered on or after Oct. 1, 2017

Id. at **Exhibit 6**. In requesting copies of the documents, the request once more failed to identify what medium it would prefer to receive the documents. *Id.* Furthermore, the request did not contain an affirmation with the understanding that there may be a fee, and if the fee is over \$25, the requester will receive a written estimate. *Id.*

C. THE DEPARTMENT'S RESPONSE.

On October 18, 2017, the Department responded to all of LVRJ outstanding public records request. *Id.* at **Exhibit 5**. The Department responded as follows:

Please be advised that records relating to LVMPD Event No. 171001-3519 are part of an open investigation. At this time any records responsive to your request is confidential and privileged pending the outcome of the investigation. *See, Donrey v. Bradshaw*, 106 Nev. 360, 798 P2d 144 (1990).

Id. LVRJ was also informed that until the investigative case is closed, the information requested cannot be provided. *Id.*

D. THE NOVEMBER 30TH PUBLIC RECORDS REQUEST AND RESPONSE.

On November 30, 2017, LVRJ sent another public records request to the Department. *Id.* at **Exhibit 7**. This time, LVRJ requested any and all documents that reflect any weapons obtained through the course of the investigation belonging to the shooter, Paddock, including search warrant returns. *Id.* Similar to LVRJ's previous request, this request failed to identify a specific medium and manner in which to receive the documents and did not affirm its understanding that there may be a fee and, if the fee is over \$25, it will receive a written estimate. *Id.*

The Department responded to LVRJ's request the same day. Specifically, the Department provided the following response:

The specific records referenced above are the subject of an ongoing criminal investigation/criminal case, and cannot be released without jeopardizing that investigation/case. Accordingly, the requested records cannot be released at this time. The denial of your request for records is based on the following laws and privileges:

(1) The requested record is not a public record under NRS 239.010(1), as such records are declared by law to be confidential. *See Pub. Employees Ret. Sys. v.*

1 *Reno Newspapers*, 129 Nev. Adv. Op. 88, 313 P.3d 221, 224-25 (2013)
2 (explaining that "statutes, rules, or case law may independently declare
3 individuals' information confidential, privileged, or otherwise protected."); *Civil*
4 *Rights for Seniors v. Admin-Office of the Courts*, 129 Nev. Adv. Op. 80, 313
5 P.3d 216, 219-20 (2013) (explaining that the Public Records Law does not require
6 the disclosure of materials that "are confidential as a matter of law").

7 (2) The law enforcement privilege, protecting open criminal investigations,
8 investigative techniques, witnesses and law enforcement personnel, and general
9 interference with an investigation applies. *See Sanchez v. City of Santa Ana*, 936
10 F.2d 1027, 1033 (9th Cir. 1991); *In re Department of Investigation of City of New*
11 *York*, 856 F.2d 481, 483-84 (2d Cir. 1988); *Morrissey v. City of New York*, 171
12 F.R.D. 85, 90 (S.D.N.Y. 1997); *See also* 5 U.S.C. section 552(b)(7)(Nevada
13 Supreme Court cites to the FOIA exemptions as analogous authority for the
14 Nevada Public Records Act. *DR Partners v. Board of County Comm'rs*, 116 Nev.
15 616, 622, 6 P.3d 465, 469 (2000); *Donrey of Nevada v. Bradshaw*, 106 Nev. 630,
16 636, 798 P.2d 144, 148, (1990))

17 The requested documents are also protected from disclosure because, under the
18 balancing test required, the law enforcement policy justifications for
19 nondisclosure here clearly outweigh the public's interest in access to the
20 documents. *See Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 636, 798 P.2d
21 144, 148, 1990 (acknowledging that law enforcement policy justifications for
22 nondisclosure such as pending criminal investigations, confidential investigative
23 techniques, potential jeopardy to law enforcement personnel, and a defendant's
24 right to a fair trial may outweigh the general policy in favor of open government).
25 Not only is the criminal investigation ongoing, it is likely to continue for a
26 considerable time as it is clearly the single largest scale investigation LVMPD has
27 ever led. The complications involved in investigating such a horrendous event
28 cannot be understated. The magnitude of the response by LVMPD forces is
unprecedented as is the collection of evidence. Evidence has been collected from
many locations, the most intense evidence collection being the site of the shooting
where 22,000 people were gathered at the time of the shooting. The concert site
alone took more than a week to process.

Please also be advised that the Las Vegas Metropolitan Police Department is the
law enforcement agency leading the above investigation, however, numerous
other law enforcement agencies have assisted or are assisting, including the FBI,
which may be in possession of records relating to your request.

Id. at **Exhibit 8**. Likewise, LVRJ was directed to refer its request to the FBI. *Id.* at **Exhibit 9**.

E. PETITIONER'S CURRENT REQUEST FOR SEARCH WARRANT MATERIALS.

On November 2, 2017, Petitioners American Broadcasting Companies, Inc., The
Associated Press, Cable News Network, Inc., Chesapeake Media I, LLC, Los Angeles Times
Communications, LLC, The New York Times Company, Scripps Broadcasting Holdings, LLC,
and WP Holdings, LLC ("Petitioners") filed an application to unseal search warrant materials
related to Paddock and the 1 October Massacre. *See* District Court Case No. A-17-764028-W.

On November 3, 2017, LVRJ sought to intervene in that action. On December 7, 2017, the Honorable Judge Cadish held a status check, in which it was determined that the Department was a party to the case, as a respondent, and LVRJ and Scripps Broadcasting were also parties, as petitioners, in that matter. In that case, Petitioners are seeking to unseal various search warrant materials, including but not limited to, search warrants related to the Mandalay Bay and Paddock's Mesquite residence. *Id.* There is currently a briefing schedule in place and a hearing set for January 16, 2018. *Id.*

III. LEGAL ARGUMENT

A. THE NEVADA PUBLIC RECORDS ACT.

Under the Nevada Public Records Act ("NPRO"), a person may request a copy of a public record from a governmental entity. *See* NRS 239.010. A request for public records must contain the requisites enumerated in NAC 239.863. Furthermore, a governmental agency may deny a public records request if the public record sought is deemed confidential. NRS 239.0107(1)(d). If the public record cannot be made available within the 5-day time period, the governmental entity must inform the person when the record will be made available. NRS 239.0107(1)(c). Upon denial of the request, the requester may apply to the district court for an order requiring the disclosure of records. NRS 239.011(1).

1. LVRJ's Requests Did Not Include the Minimum Requirements.

When submitting a request to an agency regarding public records, the requester is required to include specific information within the request. *See* NAC 239.863. Specifically, a request for public records requires, in part, the following information:

1. The form to request to inspect, copy or receive a copy of a public record of an agency of the Executive Department must include, without limitation:

...

(d) An indication of whether the person submitting the request wants to inspect, copy or receive a copy of the public record;

(e) If the person wants to receive a copy of the public record, an indication of:

(1) Whether the person wants a paper copy, an electronic copy or a certified copy of the record; and

(2) Whether the person will receive the copy of the record at the office of the agency or the person wants to receive the copy by mail, facsimile machine or electronic mail; and

(f) An oral or written affirmation by the person requesting to inspect, copy or receive a copy of the public record that the person understands that:

(1) There may be a fee to receive a copy of a public record, which the person must pay in full before receiving the copy; and

(2) He or she will receive from a records official a written estimate to reproduce the public record if the estimated actual cost of reproducing the record is more than \$25

Id.

None of LVRJ's requests complied with the requisites enumerated in the Nevada Administrative Code. Each request failed to include the medium (paper, electronic, or certified) and method to obtain the requested records. Furthermore, the October 15th and November 30th requests did not include an affirmation regarding the fee and any written statements for costs over \$25. LVRJ's non-compliance with requisites should render each request void. Because of LVRJ's improper requests, its Writ for Mandamus is premature. Thus, this Court should dismiss LVRJ's Application in its entirety.

2. The Department has not Waived Any Defenses.

Nothing within the NPRA explicitly provides for a waiver as to an agency's failure to timely deny. Rather, the remedy is to submit an application with the court and request to inspect, copy, or obtain a copy of the records. NRS 239.011. The Freedom of Information Act ("FOIA") also supports this concept. The Nevada Supreme Court has used the policy and purpose of FOIA in support of NPRA. See *DR Partners v. Board of County Comm 'rs*, 116 Nev. 616, 622, 6 P.3d 465, 469 (2000). Under FOIA, it is rare that an agency complies with the 20-day deadline. *Litigation Under Freedom of Information Act*, 110 Am. Jur. Trials. 367, § 4, ¶ 3, (Updated December 2017). Although FOIA now provides for an "extraordinary circumstance" exception, if an agency fails to respond within the time limitation, the remedy is to commence a lawsuit. *Id.* at ¶ 6.

LVRJ has failed to point to any authority, other than its own orders, demonstrating that the NPRA requires a waiver of privilege for failing to timely respond. Furthermore, nothing in

the NPRA itself mandates that the Department waives any arguments for failing to timely respond. Instead, the NPRA clearly provides for court action as the remedy for non-disclosure, just like FOIA. Moreover, it is imperative this Court take into consideration the date LVRJ made its first three requests for 911 call records—less than 24 hours from the time the massacre unfolded. It is well known that the 1 October Massacre was the deadliest mass shooting in this nation’s history. Undoubtedly, there was an incredible amount of time and manpower spent in just the first two weeks of the investigation, which was even recognized by LVRJ’s own reporters. Certainly, the Department is not dismissing the importance of responding to public records requests. Rather, this Court should consider the dynamics of the 1 October Massacre and find that an extraordinary circumstance existed for the Department’s later response concerning the 911 records. Notably, the Department timely responded to LVRJ’s other requests. Because the NPRA does not provide for a waiver of defenses for failing to timely respond, the Department has not waived any arguments related to LVRJ’s requests.

LVRJ also contends that all responses by the Department were inappropriate in accordance with *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011). In *Gibbons*, the court found that the state failed to meet its prelitigation responsibilities under NRS 239.0107(1)(d). *Id.* at 885, 266P.3d at 637. Specifically, the court determined that the blanket denial, “all the requested emails are either privileged or are not considered public records,” with a string of authorities, was not a sufficient response. *Id.* Unlike the response in *Gibbons*, the Department explained, with respect to the 911 records and purchase orders request, that there was an on-going criminal investigation and that such records could not be released until after the investigation closed. This response did not merely state the records were confidential. Instead, an explanation was provided and the Department informed LVRJ when the records would be available in accordance with NRS 239.0107(1)(c). Likewise, in response to LVRJ’s November 30th request, the Department provided a detailed justification as to its denial of the records request, including: (1) the requested documents were not public records; (2) the law enforcement privilege regarding open criminal investigations applied; and (3) the policy justifications for disclosure were outweighed by the governmental interest in the on-going investigation. To say

1 that the Department's responses were blanket denials, as that in *Gibbons*, is quite disingenuous.
2 Because the Department's responses were timely, given the circumstances, and appropriate in
3 accordance with NRS 239.0107, the Department has not waived any arguments concerning
4 LVRJ's records requests.

5 **B. THE 911 CALLS ARE CONFIDENTIAL AND THE INTEREST IN NON-**
6 **DISCLOSURE OUTWEIGHS ANY PRESUMPTION.**

7 LVRJ's entire brief relies on authority explaining that 911 records are public records.
8 The Department does not dispute that 911 records are, in fact, public records and subject to
9 NPRA. This is clearly evidenced by the Department's response that these records are part of an
10 open investigation and such records were confidential pending the outcome of the investigation.
11 See Amended Petition at **Exhibit 5**. Furthermore, authorities recognize that 911 records are
12 confidential because of an on-going investigation, as well as being subject to the personal
13 privacy exemption, and that such confidentiality clearly weighs in favor of non-disclosure.

14 **1. The Requested Calls, Logs, and Slips are Confidential as a Result of**
15 **the On-going Criminal Investigation and Interests Weigh in Favor of**
16 **Non-Disclosure**

17 In 2008, the City of Sparks issued a memorandum concerning 911 calls and dispatch logs
18 as they related to the NPRA. See Memorandum issued by Assistant City Attorney Thomas F.
19 Riley on April 2, 2008 ("Sparks Memorandum") attached hereto as **Exhibit A**. Although the
20 Sparks Memorandum is not binding authority, it is extremely instructive as it directly relates to
21 the issue at hand. The city attorney acknowledged that 911 calls and dispatch logs are subject to
22 the NPRA. In reliance on the leading Nevada Supreme Court cases *Donrey* and *DR Partners*,
23 the City Attorney further concluded "if a criminal investigation . . . is pending, there is a very
24 strong governmental interest in preventing disclosure which outweighs the public's interest in
25 releasing the records." *Id.*; *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev.630, 798 P.2d 144
(1990); *DR Partners v. Board of Cnty. Comms.*, 116 Nev. 616, 6 P.3d 465 (2000).

26 Unless a statute provides an absolute privilege against disclosure, the burden of
27 establishing the application of a privilege based upon confidentiality can only be satisfied
28 pursuant to a balancing of interests. *DR Partners*, 116 Nev. at 621, 6 P.3d at 468. In balancing

1 the interests the scales must reflect the fundamental right of a citizen to have access to the public
2 records as contrasted with the incidental right of the agency to be free from unreasonable
3 interference. *Id.* (quotations omitted). The citizen's predominant interest may be expressed in
4 terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the
5 agency to explain why the records should not be furnished. *Id.* (citation omitted).

6 The disclosure of this confidential information while there is an on-going investigation
7 could severely harm not only the Department's investigative efforts, but also the FBI's. *See*
8 Declaration of Jose Perez attached hereto as **Exhibit B**. As explained in the Sparks
9 Memorandum, a pending criminal investigation creates a strong governmental interest against
10 disclosure, which clearly outweighs the public's interest in access to the records. This exception
11 is further supported by *Donrey*. In *Donrey*, the court required disclosure of the requested
12 documents because there was no pending criminal investigation or proceeding. 106 Nev. at 636,
13 798 P.2d at 148. Given the court's reasoning for disclosure, it can only be assumed that if a
14 criminal investigation was pending, or any of the other exceptions the court outlined existed,
15 disclosure, as in this case, would be inappropriate. Both the Sparks Memorandum and *Donrey*,
16 demonstrate that the Department's interest in the on-going investigation clearly outweigh the
17 public's interest in disclosure.

18 **2. The 911 Records are Subject to the Personal Privacy Exemption and**
19 **the Balance of Interests Weigh Against Public Access.**

20 FOIA exempts records or information compiled for law enforcement purposes. 5 U.S.C.
21 § 552(b)(7). Generally, law enforcement records or information that could reasonably be
22 expected to constitute an unwarranted invasion of personal privacy are exempted from
23 disclosure. *Id.* at § 552(b)(7)(c). So long as the disclosure of the information would give rise to
24 a potential, nontrivial invasion of personal privacy, there is a privacy interest to be balanced
25 against the public interest. *Tuffly v. U.S. Dep't. of Homeland Security*, 870 F.3d 1086, 1094 (9th
26 Cir. 2017).

27 Previously, the New York Times sought to obtain the tapes and transcripts of 911 calls
28 made to the New York City Fire Department in relation to the September 11, 2001 attacks. *See*

1 *New York Times Co. v. City of New York Fire Dep't.*, 3 A.D.3d 340 (N.Y.S. 2004). The court
2 denied New York Times' request based on New York's personal privacy exemptions, which is
3 similar to FOIA's. *Id.* at 342-43. The court reasoned that the personal privacy exemption does
4 apply to the words of the callers. *Id.* at 342. Disclosure of the highly personal expressions of
5 persons who were facing imminent death, expressing fear and panic, would be hurtful to a
6 reasonable person of ordinary sensibilities who is a survivor of someone who made a 911 call
7 before dying. *Id.* The court concluded the anguish of the relatives, as well as the callers who
8 survived the attack, outweighs the public interest in disclosure of these words, which would shed
9 little light on public issues. *Id.* at 342-43.

10 The court is required to evaluate the public interest in obtaining disclosure. At this step,
11 the requester bears the burden of showing (1) that the "public interest sought to be advanced is a
12 significant one, an interest more specific than having the information for its own sake," and (2)
13 that the information is "likely to advance that interest." *Nat'l Archives & Records Admin. v.*
14 *Favish*, 541 U.S. 157, 172 (2004). In determining the significance of the public interest, the
15 relevant inquiry under the "FOIA balancing analysis is the extent to which disclosure of the
16 information sought would shed light on an agency's performance of its statutory duties or
17 otherwise let citizens know what their government is up to." *Bibles v. Or. Natural Desert Ass'n*,
18 519 U.S. 355, 355-56 (1997) (per curiam) (quotations omitted). This inquiry focuses not on the
19 "general public interest in the subject matter of the FOIA request," *Schrecker v. U.S. Dep't of*
20 *Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003), but on the "additional usefulness" of the specific
21 information withheld, *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 978 (9th Cir. 2009).

22 The personal privacy exemption recognized by FOIA and other courts must apply to the
23 requested 911 records. Just like the *New York Times* case, disclosure of the 911 calls, logs, and
24 slips would reveal highly personal expressions of the individual persons who were facing
25 imminent death, expressing fear and panic, and would be hurtful to a reasonable person of
26 ordinary sensibilities who is a survivor of someone who made a 911 call before dying. Given the
27 personal privacy exemption, FOIA places the burden on LVRJ to demonstrate that there is a
28 significant public interest that would be advanced by disclosure and such information is likely to

1 advance that interest. LVRJ has not met its burden. LVRJ simply claims it has a First
2 Amendment right to access and, as a news organization, it has the responsibility of informing the
3 public of how the 1 October Massacre events unfolded. Importantly, LVRJ's First Amendment
4 right is not absolute. Furthermore, wanting more information about the massacre is insufficient
5 to demonstrate a significant public interest that overcomes the personal privacy exemption.
6 Nonetheless, even if this Court determines it is the Department's burden to demonstrate that the
7 governmental interest outweighs public access, the reasoning set forth in *New York Times*, which
8 dealt with a similar catastrophic event, demonstrates that the Department's interest clearly
9 outweighs the need for public disclosure.

10 **C. THE DEPARTMENT'S PURCHASE ORDERS AND NO-BID**
11 **CONTRACTS REGARDING THE 1 OCTOBER MASSACRE ARE ALSO**
12 **CONFIDENTIAL AND THE INTERESTS WEIGH IN FAVOR OF NON-**
13 **DISCLOSURE.**

14 The purchase orders and no-bid contracts are confidential because of the on-going
15 investigation, as described in detail above, and because it could potentially release information
16 about law enforcement techniques. Exemption 7(E) of FOIA protects records compiled for law
17 enforcement purposes from disclosure if those records "would disclose techniques and
18 procedures for law enforcement investigations or prosecutions, or would disclose guidelines for
19 law enforcement investigations or prosecutions if such disclosure could reasonably be expected
20 to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) only exempts
21 investigative techniques not generally known to the public." *Rosenfeld v. U.S. Dep't of Justice*,
22 57 F.3d 803, 815 (9th Cir.1995). The Ninth Circuit has held the sentence structure of Exemption
23 (b)(7)(E) indicates that the qualifying phrase ("if such disclosure could reasonably be expected to
24 risk circumvention of the law") modifies only "guidelines" and not "techniques and procedures."
25 *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 778 (9th Cir. 2015). Thus, a specific means
26 rather than an application, such as guidelines, does not a showing that disclosure would lead to a
27 danger of future lawbreaking. *Id.*

28 The purchase orders for emergency purposes and no-bid contracts all in relation to the 1
October Massacre could disclose techniques and procedures of the Department, and FBI, in

1 relation to a mass casualty investigations. Furthermore, this investigation is on-going, thus
2 disclosure of these documents could also harm the on-going investigation, giving advanced
3 notice to the public of how it is handling the current investigation. For the same reasons detailed
4 above, the requested purchase orders and no-bid contracts are confidential and the Department's
5 interest in non-disclosure clearly outweighs the public's interest in access.

6 **D. THE ISSUE OF ACCESS TO SEARCH WARRANT RECORDS IS**
7 **IMPROPERLY BEFORE THIS COURT.**

8 The matter concerning search warrant materials and document is currently before Judge
9 Cadish. As such, this Court should not consider LVRJ's request regarding the same.
10 Nonetheless, LVRJ has failed to articulate that search warrant documents are subject to the
11 NPRA. On the other hands, courts have specifically exempted such documents when there is an
12 on-going investigation. Furthermore, there is neither a First Amendment qualified right or
13 common law qualified right to such documents. Therefore, LVRJ's request must be denied.

14 **1. The Issue of Search Warrant Records is Currently Before Judge**
15 **Cadish.**

16 The exact same Petitioners in this case are the same Petitioners requesting to unseal
17 search warrant materials regarding Paddock and the 1 October Massacre. Certainly, Petitioners
18 will claim that this instant request is directed at the Department, compared to the motion to
19 unseal which is directed to the Court. Nevertheless, it concerns the same documents and because
20 the issue is currently before Judge Cadish, this Court cannot enter an order regarding the same.
21 To be sure, there is a possibility that two inconsistent orders will be entered. At a minimum, the
22 Department requests the Court delay entertaining Petitioners' instant request until Judge Cadish
23 rules on the matter. At that time, it can be determined whether Petitioners' current request is
24 conflicting with the matter currently before Judge Cadish.

25 **2. The Requested Search Warrant Records are Confidential and the**
26 **Interest Weighs in Favor of Non-Disclosure.**

27 There is no authority demonstrating that search warrant records, especially during a
28 pending criminal investigation, are considered public records. In fact, the Ninth Circuit has
determined that search warrant records are judicial records. *U.S. v. Business of Custer Battlefield*

1 *Museum and Store*, 658 F.3d 1188, 1193 (9th Cir. 2011); *see also Saunders v. Superior Court*,
2 219 Cal.Rptr.3d 5 (Cal. App. 2017) (rejecting the application of California Public Records Act to
3 the media's request to the county for search warrant return records because they were judicial
4 records.); *Florida Pub Co. v. State*, 706 So.2d 54 (Ct. App. Fl. 1998) (determining that search
5 warrants and any related documents, while a criminal investigation is pending, is exempt from its
6 public records law). In further support of this theory, courts have established that while a
7 criminal investigation is pending, search warrant records are protected from both First
8 Amendment right to access and common law right to access.

9 The law recognizes two qualified rights of access to *judicial records*, a common law right
10 "to inspect and copy public records and documents, including judicial records and documents,"
11 *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted) (emphasis added),
12 and "a First Amendment right of access to criminal proceedings" and documents therein, *Press-*
13 *Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986). In support of its that that the public is entitled
14 to search warrant documents, LVRJ cherry-picked decisions from other circuits while
15 deliberately ignoring the seminal case prohibiting the disclosure of search warrant materials
16 during an on-going criminal investigation determined by the Ninth Circuit Court of Appeals in
17 *Times Mirror Co. v. U.S.*, 873 F.2d 1210 (9th Cir. 1989).

18 **a. There is no First Amendment qualified right to search warrant**
19 **records subject to a criminal investigation.**

20 The Ninth Circuit has clearly established that the First Amendment does not establish a
21 qualified right of access to search warrant proceedings and materials while a criminal
22 investigation remains ongoing. *Times Mirror Co.*, 873 F.2d at 1213. There is no doubt that the
23 issuance of search warrants has traditionally been carried out in secret, and normally, a search
24 warrant is issued after an ex parte application by the government and an *in camera* consideration
25 by a judge or magistrate. *Id.* at 1213-14.

26 There are several compelling reasons for maintaining the secrecy of warrant proceedings
27 and documents. As the *Times Mirror* court discussed, the experience of history implies a
28 judgment that warrant proceedings and documents should not be accessible to the public, at least

1 while a pre-indictment investigation is still ongoing as in these cases. *Id.* at 1214. It follows that
2 the information disclosed to the magistrate in support of the warrant request is entitled to the
3 same confidentiality accorded other aspects of the criminal investigation. *Id.* Both the
4 magistrate in granting the original sealing order and the district court in reviewing such orders
5 have necessarily been highly deferential to the government's determination that a given
6 investigation requires secrecy and that warrant materials be kept under seal. *Id.*

7 In addition, the *Times Mirror* court recognized that although the public has an interest in
8 warrant proceedings, which can enhance the quality and safeguard the integrity of the fact-
9 finding purpose, the criminal investigatory process gravely outweighs such interests. *Id.* at 1215.
10 The court further explained that the criminal investigatory process would be harmed by public
11 access. *Id.* Finally, the court described its concern with individual privacy rights associated with
12 search warrant materials. *Id.* at 1216. For example, persons who prove to be innocent are
13 frequently the subjects of government investigations. *Id.* A search warrant affidavit may supply
14 only the barest details of the government's reasons for believing that an individual may be
15 engaging in criminal activity. *Id.* Nonetheless, the issuance of a warrant-even on this minimal
16 information-may indicate to the public that government officials have reason to believe that
17 persons named in the search warrant have engaged in criminal activity. *Id.* Moreover, persons
18 named in the warrant papers will have no forum in which to exonerate themselves if the warrant
19 materials are made public before indictments are returned. *Id.* Thus, possible injury to privacy
20 interests is another factor weighing against public access to warrant materials during the pre-
21 indictment stage of an investigation. *Id.* In sum, while public access would nevertheless have
22 some positive effect by increasing the flow of information to the public about the workings of the
23 government and by deterring judicial and law enforcement officers from abusing the warrant
24 process, the incremental value in public access is slight compared to the government's interest in
25 secrecy at this stage of the investigation. *Id.* at 1218.

26 LVRJ completely misstates the holding in *United States v. Loughner* in support of its
27 public access argument to search warrant documents. The *Loughner* matter dealt with the
28 January 8, 2011 mass shooting that occurred in Tucson, Arizona during a political event at a

1 shopping center. 769 F.Supp.2d 1188, 1189 (D. Ariz. 2011). Jared Loughner was arrested at the
2 scene, and initially indicted on three federal charges including attempted assassination of a
3 member of Congress. *Id.* In the course of the criminal investigation following the shootings,
4 law enforcement agents obtained two search warrants from the Arizona Superior Court
5 authorizing a search of the Defendant's house and property. *Id.* After the warrants were
6 executed, the agents lodged them with the state court, and the warrant materials were ordered
7 sealed by a state court judge. *Id.* Shortly thereafter, media outlets filed a motion seeking to
8 unseal the warrant materials, asserting a qualified right under the First Amendment. *Id.* The
9 court held an initial hearing on the motion to unseal on February 19, 2011 and it determined it
10 was bound by *Times Mirror* based on the current state of the case—an active investigation. *Id.* at
11 1190. It was at the second hearing, after the investigation concluded and post-indictment, that
12 the Court determined *Times Mirror* was inapposite. *Id.* at 1191-92.

13 The case at hand is analogous to *Times Mirror*. Certainly, *Loughner* was initially bound
14 by *Times Mirror* while the criminal investigation was pending. After the investigation
15 concluded, however, the *Loughner* court found *Times Mirror* inapplicable and conducted its own
16 First Amendment analysis to determine whether search warrant materials, post-investigation and
17 post-indictment, should remain confidential. This Court should follow the *Times Mirror* analysis
18 as LVMPD and FBI are conducting an on-going criminal investigation concerning the events
19 leading up to the 1 October Massacre. *See* Declaration of Jose Perez, SSA attached hereto as
20 **Exhibit C**. Although Paddock cannot be prosecuted, the government's investigation cannot be
21 rendered meaningless. Moreover, in *Loughner*, the shooter had already been indicted when the
22 media initially requested to unseal search warrant documents. Despite the indictment, the
23 *Loughner* court held that it was nonetheless bound by *Times Mirror* because of the active
24 criminal investigation. The same analysis applies to this instant case. Notwithstanding the death
25 of Paddock, there remains an active criminal investigation. As a result, LVRJ's request to access
26 to the search warrant return documents related to the 1 October Massacre must be denied.

1 **b. There is no common law right to search warrant records**
2 **subject to a criminal investigation.**

3 The Supreme Court has recognized that the public has a right, founded in the common
4 law, "to inspect and copy public records and documents, including judicial records and
5 documents." *Nixon*, 435 U.S. at 598. Courts have generally agreed that warrant materials are
6 "judicial records and documents." *Business of Custer*, 658 F.3d at 1193 (citation omitted). This
7 right, however, is not absolute. *Nixon*, 435 U.S. at 598. Indeed, the *Times Mirror* Court
8 identified two categories of documents that are not covered by the common law right of access—
9 grand jury transcripts and warrant materials in the midst of an on-going investigation. 873 F.2d
10 at 1219. The court affirmed its *Times Mirror* decision decades later and further held that a
11 common law right of access applies to warrant materials *after* an investigation has ended.
12 *Business of Custer*, 658 F.3d at 1192 (emphasis added). In support of its decision, the Ninth
13 Circuit recognized that warrant applications proceedings are highly secret in nature and have
14 historically been closed to the press and public. *Id.* at 1193 (citation omitted). Post-
15 investigation, however, warrant materials have historically been available to the public. *Id.*
16 Thus, a common law right of access to warrant materials arises after an investigation has been
17 terminated. *Id.* at 1194.

18 Despite the fact Paddock was a lone shooter, there remains an on-going criminal
19 investigation into the events leading up to the 1 October Massacre. This is not a simple
20 homicide-suicide case. Understandably, this massacre took the lives of 58 individuals, mostly
21 who lived out of state, and involved several blocks of Las Vegas Boulevard, including the venue
22 and hotel. Indeed, the Sandy Hook investigation, which dealt with a similar scenario to the 1
23 October Massacre, just concluded 5 years later.² Importantly, this matter is not limited to
24 LVMPD's continuing investigation, but also the FBI's on-going criminal investigation. *See*
25 **Exhibits B and C.** There is no doubt that releasing any highly confidential and sensitive
26 information will impede not only LVMPD's on-going investigation but also the FBI's

27 ² *See e.g.,* FBI Releases Documents Related to Newtown Sandy Hook Shooting,
28 <https://www.reviewjournal.com/news/nation-and-world/fbi-releases-documents-related-to-newtown-sandy-hook-shooting/>

1 investigation. *Id.* Notwithstanding these consequences, the on-going criminal investigation
2 entirely precludes a common law qualified right to access, requiring LVRJ to articulate a need
3 for the search warrant returns that outweighs the government's interest in confidentiality.

4 With no common law right presumption, disclosure of warrant materials is only
5 appropriate if the movant can demonstrate a threshold showing that disclosure would serve the
6 ends of justice. *Id.* (citing *Berry v. Dep't. of Justice*, 733 F.2d 1313, 1352 (9th Cir. 1984).
7 Whether disclosure is warranted in a given case requires the court to balance the need for
8 disclosure against the reasons for confidentiality. *U.S. Indus., Inc. v. United States Dist. Court*,
9 345 F.2d 18, 21 (9th Cir. 1965). In the absence of an absolute prohibition against disclosure, an
10 exercise of judicial discretion is manifestly required to determine whether such a need exists. *Id.*

11 The government's interest in confidentiality clearly outweighs LVRJ's need to learn as
12 much as possible about the government's response to the 1 October Massacre. As explained in
13 *Times Mirror*, public access to search warrant materials gravely impedes the criminal
14 investigatory process. Moreover, the warrant process is a confidential, ex parte process. While
15 the public does have an interest in ensuring the quality and safeguarding the fact-finding process,
16 it is not entitled to carte blanche access into governmental investigations. Furthermore, other
17 safeguards are in place to ensure the government's response to the 1 October Massacre was
18 lawful, such as 42 U.S.C. § 1983 lawsuits. As such, the governmental need for confidentiality of
19 an on-going criminal investigation outweighs the LVRJ's need to be informed about the
20 government's response.

21 **E. A PRIVILEGE LOG IS NOT NECESSARY IN THIS MATTER.**

22 A *Vaughn* index is a submission commonly utilized in cases involving FOIA, the federal
23 analog of the NPRA. *Gibbons*, 127 Nev. at 821, 266 P.3d 628. This submission typically
24 contains "detailed public affidavits identifying the documents withheld, the FOIA exemptions
25 claimed, and a particularized explanation of why each document falls within the claimed
26 exemption." *Id.* (citing *Lion Raisins v. U.S. Dept. of Agriculture*, 354 F.3d 1072, 1082 (9th
27 Cir.2004). Broadly stated, a *Vaughn* index is designed to preserve a fair adversarial proceeding
28 when a lawsuit is brought after the denial of a FOIA request. *Id.* (citing *Wiener v. F.B.I.*, 943

1 F.2d 972, 977 (9th Cir.1991) (“The purpose of the index is to ‘afford the FOIA requester a
2 meaningful opportunity to contest, and the district court an adequate foundation to review, the
3 soundness of the withholding.’ ” (citation omitted)).

4 The Nevada Supreme Court, however, explicitly held that a log is *not* required each time
5 records are withheld. *Id.* Rather, a *Vaughn* index is a method for resolving the tension between
6 the government’s interest in keeping certain records confidential and the requesting party’s need
7 for enough information to meaningfully contest a claim of confidentiality. *Id.* at 881-82, 266
8 P.3d at 629. In circumstances where the requesting party has sufficient information to present a
9 full legal document, as LVRJ has done here, there is no need for a *Vaughn* index. *Id.* The court
10 further determined that if a log were required—in the form of a *Vaughn* index—each time a
11 lawsuit is brought after the denial of an NRPA request, the court would be rewriting the NRPA
12 as there is no such requirement imposed within the Act. *Id.*

13 LVRJ has meaningfully articulated in its brief, without the need of any log, the exact
14 documents it seeks and its arguments to contest the Department’s confidentiality claim. Unlike
15 the vast array of emails that were discussed in *Gibbons*, this matter concerns a single event—the
16 1 October Massacre. Furthermore, a log would not provide any additional information to assist
17 LVRJ to contest the Department’s confidentiality defense. For instance, LVRJ’s 911 records
18 request is extremely specific—911 calls from 8:00 p.m. to 2:00 a.m. regarding the shooting.
19 LVRJ has further requested any and all documents, including the search warrant returns,
20 regarding the firearms discovered by law enforcement that belonged to Paddock. The only
21 additional information a log could possibly provide is the actual firearm, which the Department
22 has clearly objected to on several different grounds. Finally, purchase orders and no-bid
23 contracts regarding the single event are also self-explanatory and do not require a log. As such,
24 the Department requests the Court to deny LVRJ’s request that a log for the requested records be
25 submitted.
26
27
28

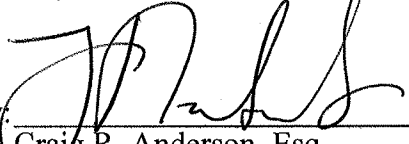
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IV. CONCLUSION

Based on the foregoing, LVMPD respectfully requests the Court denies Petitioner Las Vegas Review Journal's Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.001 / Petition for Writ of Mandamus (Expedited Matter Pursuant to Nev. Rev. Stat. § 239.001).

Dated this 8th day of January, 2018.

MARQUIS AURBACH COFFING

By: 

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S OPPOSITION TO PETITIONER LAS VEGAS REVIEW JOURNAL'S PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001 / PETITION FOR WRIT OF MANDAMUS (EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.001)** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 8th day of January, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:³

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

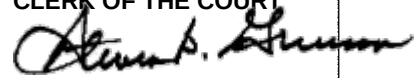
N/A



An employee of Marquis Aurbach Coffing

³ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT D



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DISTRICT COURT

CLARK COUNTY, NEVADA

AMERICAN BROADCASTING COMPANIES,
INC.; THE ASSOCIATED PRESS; CABLE
NEWS NETWORK, INC.; CHESAPEAKE
MEDIA I, LLC, D/B/A KSNV-TV; LOS
ANGELES TIMES COMMUNICATIONS,
LLC; THE NEW YORK TIMES COMPANY;
AND WP COMPANY LLC D/B/A THE
WASHINGTON POST,

Petitioners,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

Case No.: A-17-764030-W
Consolidated Case No.: A-17-764169-W

Dept. No.: 2

**RESPONDENT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S
OPPOSITION TO PETITIONER LAS VEGAS REVIEW JOURNAL'S PUBLIC
RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001 /
PETITION FOR WRIT OF MANDAMUS**

EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.001

Respondent Las Vegas Metropolitan Police Department ("LVMPD" or the "Department"), by and through its attorney of record Nicholas Crosby, Esq. and Jackie Nichols, Esq. of Marquis Aurbach Coffing, hereby files its Opposition to Petitioners' Joinder to Opening Brief in Support of Amended Public Records Act Application Pursuant to Nev. Rev. Stat. §239.001/Petition for Writ of Mandamus. This Opposition is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities, and any oral argument allowed by the Court at a hearing on this matter.

MEMORANDUM OF POINTS & AUTHORITIES¹

I. INTRODUCTION

The public records sought are not only subject to an on-going investigation, but are also protected by the personal privacy exemption enumerated in FOIA and other states public records laws. Furthermore, the requested records may reveal investigative techniques in how the Department responds to such crises. Moreover, Petitioners' requests did not comply with NPRA, and therefore, should not be considered by this Court.

Even if the Court considers Petitioners' non-compliant requests, dismissal is still appropriate. Petitioners' records request must be denied in its entirety because the records are confidential due to the on-going criminal investigation, are an unwarranted invasion to personal privacy, may reveal investigative strategy and tactics, and are not public records.

II. STATEMENT OF FACTS

On October 1, 2017, Las Vegas suffered the deadliest mass shooting in this nation's history (hereinafter "1 October Massacre"). As we all know, Stephen Paddock ("Paddock") fired rounds from a 32nd floor hotel room at the Mandalay Bay, directed at the Route 91 Harvest Festival country concert that was taking place across the Las Vegas Boulevard. Ultimately, Paddock killed 58 people, including one of the Department's own, Charles Hartfield, and injured over 500 others. For approximately a week and a half, the Department took an "all hands on deck" approach in handling the criminal investigation into the 1 October Massacre. There is no

¹ The Department hereby incorporates the Memorandum of Points and Authorities provided in its Opposition to LVRJ's Public Records Act Application filed on January 8, 2018 (the "Opposition").

1 doubt about the amount of time and manpower the on-going investigation initially required. In
2 fact, the Federal Government commended the Department's efforts and agreed to give the
3 Department \$1 million to assist with offsetting the significant overtime costs associated with the
4 criminal investigation.²

5 **A. PETITIONER ABC'S RECORDS REQUESTS.**

6 Like LVRJ, Petitioner ABC also made public records requests just hours after the 1
7 October Massacre unfolded. *See* Amended Petition for Writ of Mandamus filed on November
8 28, 2017 ("Amended Petition") on file herein. On October 2, 2017, Petitioner ABC made the
9 following overbroad request to LVMPD:

10 Pursuant to all laws and practices in the state of Nevada and your jurisdiction,
11 please accept this as a formal request for all body-cam, dashcam, CCTV video
(publicly owned and privately owned), *as well as any other types of recordings*
12 connected with the active shooter/mass casualty event on Oct. 1, 2017. Also, ABC
News requests all police radio traffic, and all police reports connected with the
13 incident.

14 *Id.* at **Exhibit 1** (emphasis added). The following day LVMPD responded, informing Petitioner
ABC that the recordings are evidence in an on-going criminal investigation and cannot be
15 released. *Id.* And, once the case has been completed, the requested documents will be eligible
16 for release as a public record. *Id.*

17 Shortly thereafter, Petitioner ABC requested copies of all 911 audio connected with the 1
18 October Massacre investigation. *Id.* at **Exhibit 2**. This request lacked specific information as
19 required by the Nevada Public Records Act (the "NPRA"), including the medium and manner
20 Petitioner ABC wished to receive the information and an affirmation regarding any fees
21 Petitioner ABC may be responsible for or the need for an estimate. *Id.* Nonetheless, LVMPD
22 once more reminded ABC that *all* records related to the 1 October Massacre are part of an open
23 investigation and are confidential and privileged, pending the outcome of the investigation. *Id.*
24 (emphasis added).

25
26 ² *See* USA Today: Las Vegas Shooting: Trump pledges \$1 million to Las Vegas law enforcement after
27 shooting. <https://www.usatoday.com/story/news/politics/2017/10/11/trump-pledges-1-million-las-vegas-law-enforcement-after-mass-shooting/755452001/> (dated October 11, 2017) (last accessed January 8,
28 2018).

1 **B. PETITIONER CNN'S RECORDS REQUEST.**

2 On October 3, 2017, Petitioner CNN submitted the following unlimited public records
3 request to LVMPD:

4 Pursuant to the Nevada Public Records Act NRS 239.001, Cable News Network
5 (CNN) is requesting access to *all copies of records pertaining to Stephen*
6 *Paddock*, the suspect in the Las Vegas Shooting, specifically including but not
limited to 911 dispatch calls, evidence logs, hotel surveillance video, police body
cam footage, interview reports, and anything related to this shooting investigation.

7 *Id.* at **Exhibit 3**. Again, LVMPD appropriately and timely responded, notifying Petitioner CNN
8 that the records requested were part of an on-going criminal investigation and, as the records
9 were considered evidence of the investigation, the records would be released upon completion of
10 the investigation. *Id.*

11 **C. PETITIONER LA TIMES' RECORDS REQUEST.**

12 On October 10, 2017, Petitioner LA Times requested the 911 recordings related to the
13 shooting. *Id.* at **Exhibit 4**. Notably, this request lacked the requester's address and failed to
14 identify what medium and manner it would prefer to receive the documents. *Id.* Furthermore,
15 the request did not contain an affirmation with the understanding that there may be a fee, and if
16 the fee is over \$25, the requester will receive a written estimate. *Id.* As a result of Petitioner LA
17 Times' significant failure to comply with NPRA, the Department was not required to respond to
18 the request.

19 **D. PETITIONER ASSOCIATED PRESS' RECORDS REQUESTS.**

20 Petitioner AP also made a request for the 911 calls related to the shooting. *Id.* at **Exhibit**
21 **5**. Like other requests, Petitioner AP's request lacked the manner and mode it wished to receive
22 the recordings. *Id.* Despite Petitioner AP's non-compliance with NPRA, LVMPD appropriately
23 and timely responded, notifying Petitioner AP that the records related to the 1 October Massacre
24 were part of an on-going criminal investigation and, as the records were considered evidence of
25 the investigation, the records would be released upon completion of the investigation. *Id.*

26 Ignoring LVMPD's response, Petitioner AP allegedly submitted a second request for
27 body worn camera footage and the 911 recordings. *Id.* at **Exhibit 6**. Importantly, nothing
28 demonstrates Petitioner AP submitted the form to LVMPD. *Id.* Furthermore, Petitioner AP

1 inappropriately requested 911 recordings on a form strictly used for requesting body worn
2 camera footage. *Id.* Petitioner AP also failed to include information required by NPRA,
3 including the manner and mode it wanted to receive the requested documents and the affirmation
4 acknowledging any fee and possible estimate. *Id.* Nevertheless, LVMPD already informed AP
5 that *all* records related to the 1 October Massacre were subject to an on-going investigation and
6 could not be disclosed until the investigation was complete. *Id.* at **Exhibit 5**.

7 **E. PETITIONER NEW YORK TIMES' RECORDS REQUEST.**

8 Petitioner New York Times ("NYT") submitted a broad request for "public records that
9 include information about emergency response to the mass shooting." *Id.* at **Exhibit 7**.
10 Petitioner NYT then provided a list of example of documents LVMPD's response should
11 include. *Id.* This expansive request does not sufficiently describe the records in accordance with
12 NPRA.

13 **F. PETITIONER KTNV-TV'S RECORDS REQUEST.**

14 On November 6, 2017, Petitioner KTNV-TV allegedly submitted a request for "records
15 pertaining to the shooting." *See* Joinder at p. 4. The Amended Petition, however, does not
16 provide any evidence of what the request to LVMPD entailed. *See* Amended Petition at ¶¶ 39-40
17 and at **Exhibit 8**. If Petitioner KTNV-TV's request did simply ask for "records," "records" is
18 not a sufficient description for disclosure of documents under the NPRA. The Department
19 nonetheless responded to Petitioner KTNV-TV's deficient request. Specifically, the Department
20 provided the following response:

21 The specific records referenced above are the subject of an ongoing criminal
22 investigation/criminal case, and cannot be released without jeopardizing that
23 investigation/case. Accordingly, the requested records cannot be released at this
time. The denial of your request for records is based on the following laws and
privileges:

24 (1) The requested record is not a public record under NRS 239.010(1), as such
25 records are declared by law to be confidential. *See Pub. Employees Ret. Sys. v.*
26 *Reno Newspapers*, 129 Nev. Adv. Op. 88, 313 P.3d 221, 224-25 (2013)
(explaining that "statutes, rules, or case law may independently declare
27 individuals' information confidential, privileged, or otherwise protected."); *Civil*
28 *Rights for Seniors v. Admin-Office of the Courts*, 129 Nev. Adv. Op. 80, 313
P.3d 216, 219-20 (2013) (explaining that the Public Records Law does not require
the disclosure of materials that "are confidential as a matter of law").

(2) The law enforcement privilege, protecting open criminal investigations, investigative techniques, witnesses and law enforcement personnel, and general interference with an investigation applies. *See Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1991); *In re Department of Investigation of City of New York*, 856 F.2d 481, 483-84 (2d Cir. 1988); *Morrissey v. City of New York*, 171 F.R.D. 85, 90 (S.D.N.Y. 1997); *See also* 5 U.S.C. section 552(b)(7)(Nevada Supreme Court cites to the FOIA exemptions as analogous authority for the Nevada Public Records Act. *DR Partners v. Board of County Comm 'rs*, 116 Nev. 616, 622, 6 P.3d 465, 469 (2000); *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 636, 798 P.2d 144, 148, (1990))

(3) The requested documents are also protected from disclosure because, under the balancing test required, the law enforcement policy justifications for nondisclosure here clearly outweigh the public's interest in access to the documents. *See Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 636, 798 P.2d 144, 148, 1990 (acknowledging that law enforcement policy justifications for nondisclosure such as pending criminal investigations, confidential investigative techniques, potential jeopardy to law enforcement personnel, and a defendant's right to a fair trial may outweigh the general policy in favor of open government). Not only is the criminal investigation ongoing, it is likely to continue for a considerable time as it is clearly the single largest scale investigation LVMPD has ever led. The complications involved in investigating such a horrendous event cannot be understated. The magnitude of the response by LVMPD forces is unprecedented as is the collection of evidence. Evidence has been collected from many locations, the most intense evidence collection being the site of the shooting where 22,000 people were gathered at the time of the shooting. The concert site alone took more than a week to process.

Please also be advised that the Las Vegas Metropolitan Police Department is the law enforcement agency leading the above investigation, however, numerous other law enforcement agencies have assisted or are assisting, including the FBI, which may be in possession of records relating to your request.

Id. at **Exhibit 8.**

G. PETITIONER WASHINGTON POST'S RECORDS REQUEST.

Notably, nothing in Petitioners' initial application or Amended Petition demonstrates that Petitioner Washington Post, in fact, made a request. *See* Amended Petition. Petitioners' Joinder further lacks any evidence that Petitioner Washington Post submitted a request to LVMPD for public records.

III. LEGAL ARGUMENT

A. THE NEVADA PUBLIC RECORDS ACT.

Under the Nevada Public Records Act ("NPRO"), a person may request a copy of a public record from a governmental entity. *See* NRS 239.010. A request for public records must contain the requisites enumerated in NAC 239.863. Furthermore, a governmental agency may

1 deny a public records request if the public record sought is deemed confidential. NRS
2 239.0107(1)(d). If the public record cannot be made available within the 5-day time period, the
3 governmental entity must inform the person when the record will be made available. NRS
4 239.0107(1)(c). Upon denial of the request, the requester may apply to the district court for an
5 order requiring the disclosure of records. NRS 239.011(1).

6 **1. Petitioner Washington Post Does Not Have Standing Under the**
7 **NPRA.**

8 As evidenced through Petitioners' initial application and Amended Petition, Petitioner
9 Washington Post never submitted a public records request to LVMPD. According the NRS
10 239.011, in order to apply to the district court, the requester must initially have been denied
11 access to records. Certainly, Petitioner Washington Post must first submit a request in order to
12 be denied. The NPRA does not allow Petitioner Washington Post to piggy-back onto the other
13 Petitioners' requests, without ever submitting a request of its own. Without ever making a
14 request, Petitioner Washington Post has no standing to apply to this Court for an order for
15 disclosure of records. As such, the Department requests that Petitioner Washington Post be
16 dismissed from this action.

17 **2. Petitioners' Requests Did Not Include the Minimum Requirements.**

18 When submitting a request to an agency regarding public records, the requester is
19 required to include specific information within the request. See NAC 239.863. Specifically, a
20 request for public records requires, in part, the following information:

21 1. The form to request to inspect, copy or receive a copy of a public record of an
22 agency of the Executive Department must include, without limitation:

23 (a) The name, address and telephone number of the person submitting the request;

24 (b) The date that the request is submitted to the agency;

25 (c) A description of the public record that is sufficient to identify the record;

26 (d) An indication of whether the person submitting the request wants to inspect,
27 copy or receive a copy of the public record;

28 (e) If the person wants to receive a copy of the public record, an indication of:

(1) Whether the person wants a paper copy, an electronic copy or a
certified copy of the record; and

1 (2) Whether the person will receive the copy of the record at the office of
2 the agency or the person wants to receive the copy by mail, facsimile machine or
electronic mail; and

3 (f) An oral or written affirmation by the person requesting to inspect, copy or
4 receive a copy of the public record that the person understands that:

5 (1) There may be a fee to receive a copy of a public record, which the
person must pay in full before receiving the copy; and

6 (2) He or she will receive from a records official a written estimate to
7 reproduce the public record if the estimated actual cost of reproducing the record
is more than \$25

8 *Id.*

9 None of Petitioners' requests complied with the requisites enumerated in the Nevada
10 Administrative Code. Each request failed to include at least one, if not more, of these requisites.
11 For example, Petitioner LA Times had the most deficient request by not including an address,
12 medium and manner to receive documents, and affirmation acknowledge fees and the possibility
13 of an estimate. Likewise, KTNV-TV's request was also deficient because it allegedly requested
14 (as there is no copy of their request) "records pertaining to the shooting," which is not a specific
15 description of the records sought. Many requests submitted by Petitioners also contain blanket
16 statements such as "anything related to this shooting investigation." The Department cannot be
17 expected to simply handover ever single document that *could* possibly fit under that description.
18 According to NPRA, Petitioners are required to submit requests with specific information,
19 including sufficient descriptions of records—not blanket requests. Petitioners' non-compliance
20 with requisites should render each request void. Because of Petitioners' improper requests, its
21 Writ for Mandamus is premature. Thus, this Court should dismiss Petitioners' Application in its
22 entirety.

23 **3. The Department has not Waived Any Defenses.**

24 As explained in LVMPD's Opposition, nothing within the NPRA explicitly provides for
25 a waiver as to an agency's failure to timely deny. Rather, the remedy is to submit an application
26 with the court and request to inspect, copy, or obtain a copy of the records. NRS 239.011. The
27 Freedom of Information Act ("FOIA") also supports this concept. The Nevada Supreme Court
28 has used the policy and purpose of FOIA in support of NPRA. See *DR Partners v. Board of*

1 *County Comm'rs*, 116 Nev. 616, 622, 6 P.3d 465, 469 (2000). Under FOIA, it is rare that an
2 agency complies with the 20-day deadline. *Litigation Under Freedom of Information Act*, 110
3 Am. Jur. Trials. 367, § 4, ¶ 3, (Updated December 2017). Although FOIA now provides for an
4 "extraordinary circumstance" exception, if an agency fails to respond within the time limitation,
5 the remedy is to commence a lawsuit. *Id.* at ¶ 6.

6 Like LVRJ, Petitioners have failed to point to any authority demonstrating that the NPRA
7 requires a waiver of privilege for failing to timely respond. Furthermore, nothing in the NPRA
8 itself mandates that the Department waives any arguments for failing to timely respond. Instead,
9 the NPRA clearly provides for court action as the remedy for non-disclosure, just like FOIA.

10 Petitioners also allege that all responses by the Department were inappropriate in
11 accordance with *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011). In
12 *Gibbons*, the court found that the state failed to meet its prelitigation responsibilities under NRS
13 239.0107(1)(d). *Id.* at 885, 266P.3d at 637. Specifically, the court determined that the blanket
14 denial, "all the requested emails are either privileged or are not considered public records," with
15 a string of authorities, was not a sufficient response. *Id.* Unlike the response in *Gibbons*, the
16 Department explained that there was an on-going criminal investigation and that such records
17 could not be released until after the investigation closed. The Department's responses did not
18 merely state the records were confidential. Instead, an explanation was provided and the
19 Department informed Petitioners when the records would be available in accordance with NRS
20 239.0107(1)(c). To say that the Department's responses were blanket denials, as that in *Gibbons*,
21 is quite disingenuous. On the other hand, Petitioners' requests were not in compliance with
22 NAC 239.863, as explained above, and thus, did not require a response from LVMPD. Because
23 the Department's responses were timely, given the circumstances, and appropriate in accordance
24 with NRS 239.0107, the Department has not waived any arguments concerning Petitioners'
25 records requests.

26 ...

27 ...

28 ...

1 **B. THE 911 CALLS ARE CONFIDENTIAL AND THE INTEREST IN NON-**
2 **DISCLOSURE OUTWEIGHS ANY PRESUMPTION.**

3 As the Department provided in its Opposition, the 911 records that Petitioners and LVRJ
4 seek are confidential and, given the on-going investigation, the interest clearly weighs in favor of
5 non-disclosure. Petitioners have not added any new authority to their Joinder, but instead, rely
6 solely on LVRJ's Opening Brief to support its argument that the 911 records of the 1 October
7 Massacre should be released. Thus, the Department incorporates the arguments already detailed
8 in its Opposition against Petitioners.

9 **C. THE DEPARTMENT'S BODY WORN CAMERA FOOTAGE IS**
10 **CONFIDENTIAL AND THE INTERESTS WEIGH IN FAVOR ON NON-**
11 **DISCLOSURE.**

12 Freedom of Information Act ("FOIA") exempts records or information compiled for law
13 enforcement purposes. 5 U.S.C. § 552(b)(7). Generally, law enforcement records or information
14 that could reasonably be expected to constitute an unwarranted invasion of personal privacy are
15 exempted from disclosure. *Id.* at § 552(b)(7)(c). So long as the disclosure of the information
16 would give rise to a potential, nontrivial invasion of personal privacy, there is a privacy interest
17 to be balanced against the public interest. *Tuffly v. U.S. Dep't. of Homeland Security*, 870 F.3d
18 1086, 1094 (9th Cir. 2017).

19 Previously, the New York Times sought to obtain the tapes and transcripts of 911 calls
20 made to the New York City Fire Department in relation to the September 11, 2001 attacks. *See*
21 *New York Times Co. v. City of New York Fire Dep't.*, 3 A.D.3d 340 (N.Y.S. 2004). The court
22 denied New York Times' request based on New York's personal privacy exemptions, which is
23 similar to FOIA's. *Id.* at 342-43. The court reasoned that the personal privacy exemption does
24 apply to the words of the callers. *Id.* at 342. Disclosure of the highly personal expressions of
25 persons who were facing imminent death, expressing fear and panic, would be hurtful to a
26 reasonable person of ordinary sensibilities who is a survivor of someone who made a 911 call
27 before dying. *Id.* The court concluded the anguish of the relatives, as well as the callers who
28 survived the attack, outweighs the public interest in disclosure of these words, which would shed
little light on public issues. *Id.* at 342-43.

1 The court is required to evaluate the public interest in obtaining disclosure. At this step,
2 the requester bears the burden of showing (1) that the “public interest sought to be advanced is a
3 significant one, an interest more specific than having the information for its own sake,” and (2)
4 that the information is “likely to advance that interest.” *Nat’l Archives & Records Admin. v.*
5 *Favish*, 541 U.S. 157, 172 (2004). In determining the significance of the public interest, the
6 relevant inquiry under the “FOIA balancing analysis is the extent to which disclosure of the
7 information sought would shed light on an agency’s performance of its statutory duties or
8 otherwise let citizens know what their government is up to.” *Bibles v. Or. Natural Desert Ass’n*,
9 519 U.S. 355, 355–56 (1997) (per curiam) (quotations omitted). This inquiry focuses not on the
10 “general public interest in the subject matter of the FOIA request,” *Schrecker v. U.S. Dep’t of*
11 *Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003), but on the “additional usefulness” of the specific
12 information withheld, *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 978 (9th Cir. 2009).

13 The personal privacy exemption recognized by FOIA and other courts must apply to the
14 requested body worn camera footage. Just like the *New York Times* case, disclosure of this
15 footage would reveal highly personal expressions of the individual persons who were facing
16 imminent death, expressing fear and panic, and would be hurtful to a reasonable person of
17 ordinary sensibilities who is a survivor of someone who lost their lives, or even injured, in the 1
18 October Massacre. Given the personal privacy exemption, FOIA places the burden on
19 Petitioners to demonstrate that there is a significant public interest that would be advanced by
20 disclosure and such information is likely to advance that interest. Petitioners have not met its
21 burden. Petitioners have failed to articulate any specific reason for these confidential and
22 sensitive records. Furthermore, wanting more information about the massacre is insufficient to
23 demonstrate a significant public interest that overcomes the personal privacy exemption.
24 Nonetheless, even if this Court determines it is the Department’s burden to demonstrate that the
25 governmental interest outweighs public access, the reasoning set forth in *New York Times*, which
26 dealt with a similar catastrophic event, demonstrates that the Department’s interest clearly
27 outweighs the need for public disclosure.

28 ...

1 The body worn camera footage is also confidential because it could potentially release
2 information about law enforcement techniques. Exemption 7(E) of FOIA protects records
3 compiled for law enforcement purposes from disclosure if those records “would disclose
4 techniques and procedures for law enforcement investigations or prosecutions, or would disclose
5 guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably
6 be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) only
7 exempts investigative techniques not generally known to the public.” *Rosenfeld v. U.S. Dep't of*
8 *Justice*, 57 F.3d 803, 815 (9th Cir.1995). The Ninth Circuit has held the sentence structure of
9 Exemption (b)(7)(E) indicates that the qualifying phrase (“if such disclosure could reasonably be
10 expected to risk circumvention of the law”) modifies only “guidelines” and not “techniques and
11 procedures.” *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 778 (9th Cir. 2015). Thus, a
12 specific means rather than an application, such as guidelines, does not a showing that disclosure
13 would lead to a danger of future lawbreaking. *Id.*

14 Disclosure of the footage of body worn cameras related to the 1 October Massacre will
15 reveal techniques and procedures of the Department, as it relates to mass casualty investigations.
16 Furthermore, this investigation is on-going, thus disclosure of these documents could also harm
17 the on-going investigation, giving advanced notice to the public of how the Department is
18 handling the current investigation. For the same reasons detailed above, the requested body
19 worn camera footage is confidential and the Department’s interest in non-disclosure clearly
20 outweighs the public’s interest in access.

21 Finally, NRS 289.830 requires the public record request to identify the footage on a per
22 incident basis and if such video contains confidential information, it made be available for
23 inspection only. Blanket requests for body camera footage related to the 1 October Massacre is
24 not sufficient. This is also demonstrated by LVMPD’s own form, the form Petitioner AP
25 allegedly used, which indicates requesters must also include the officer’s name in which they
26 seek the footage. Alternatively, if this Court determines that disclosure is necessary, the
27 Department requests that Petitioners be permitted to inspect the requested records, rather than
28 outright disclosure, given the confidentiality of the footage.

1 **D. THE “REMAINING REQUESTED DOCUMENTS” ARE ALSO**
2 **CONFIDENTIAL AND THE INTERESTS WEIGH IN FAVOR OF NON-**
3 **DISCLOSURE.**

4 Many of the Petitioners have made blanket requests for any public record documents
5 related to the shooting. These broad requests are prohibited under the NPRA. Requesters must
6 describe the records with enough specificity to identify the records. NAC 239.863(1)(c). Thus,
7 to the extent Petitioners made blanket requests regarding all documents related to the 1 October
8 Massacre, the requests should be denied for non-compliance.

9 Nevertheless, the requested documents, including CCTV video, evidence logs, interview
10 reports, and any additional records the Department may have in its possession are confidential
11 under the personal privacy exemptions and may reveal investigative techniques and procedures
12 for law enforcement investigations. Moreover, the Department has already explained to
13 Petitioners that the requested records may be made available at the end of the investigation.
14 Evidence logs and interview reports are important investigative materials that cannot be
15 produced until after the investigation has ended. Both CCTV video and interview reports are
16 protected from the personal privacy exemption outlined in FOIA. For these reasons, Petitioners’
17 “remaining record requests” must be dismissed.

18 **E. LVMPD WAS NOT REQUIRED TO PRODUCE A PRIVILEGE LOG**
19 **PRIOR TO LITIGATION.**

20 A *Vaughn* index is a submission commonly utilized in cases involving FOIA, the federal
21 analog of the NPRA. *Gibbons*, 127 Nev. at 821, 266 P.3d 628. This submission typically
22 contains “detailed public affidavits identifying the documents withheld, the FOIA exemptions
23 claimed, and a particularized explanation of why each document falls within the claimed
24 exemption.” *Id.* (citing *Lion Raisins v. U.S. Dept. of Agriculture*, 354 F.3d 1072, 1082 (9th
25 Cir.2004)). Broadly stated, a *Vaughn* index is designed to preserve a fair adversarial proceeding
26 when a lawsuit is brought after the denial of a FOIA request. *Id.* (citing *Wiener v. F.B.I.*, 943
27 F.2d 972, 977 (9th Cir.1991) (“The purpose of the index is to ‘afford the FOIA requester a
28 meaningful opportunity to contest, and the district court an adequate foundation to review, the
soundness of the withholding.’ ” (citation omitted))).

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The Nevada Supreme Court, however, explicitly held that a log is *not* required each time records are withheld. *Id.* Rather, a *Vaughn* index is a method for resolving the tension between the government’s interest in keeping certain records confidential and the requesting party’s need for enough information to meaningfully contest a claim of confidentiality. *Id.* at 881-82, 266 P.3d at 629. In circumstances where the requesting party has sufficient information to present a full legal document, as Petitioners have done here, there is no need for a *Vaughn* index. *Id.* The court further determined that if a log were required—in the form of a *Vaughn* index—each time a lawsuit is brought after the denial of an NRPA request, the court would be rewriting the NRPA as there is no such requirement imposed within the Act. *Id.*

Petitioners contend the Department was required to include a privilege log along with its denials. To the contrary, nothing in NPRPA requires an index or privilege log in response to a public record request. Furthermore, *Gibbons* makes clear that such a log or index is not required under FOIA in the pre-litigation stage. To the extent Petitioners are requesting LVMPD now submit a privilege log, LVMPD objects on the same basis already set forth in its Opposition—the Petitioners have already articulated they have sufficient information as presented in their Amended Petition and Joinder.

F. THE DEPARTMENT REQUESTS AN *IN CAMERA* HEARING.

If the Court is inclined to grant Petitioners and LVRJ’s applications, the Department requests the Court to hold an *in camera* hearing with FBI and LVMPD investigators to ascertain the depth of the on-going investigation. Given the on-going investigation, the Department is unable to articulate every detail within its pleading to support its position of confidentiality and the government’s interest in non-disclosure.

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1 **IV. CONCLUSION**

2 Based on the foregoing, LVMPD respectfully requests the Court denies Petitioners'
3 Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.001 / Petition for Writ of
4 Mandamus (Expedited Matter Pursuant to Nev. Rev. Stat. § 239.001).

5 Dated this 16th day of January, 2018.

6
7 MARQUIS AURBACH COFFING

8
9 By: /s/ Jackie V. Nichols

10 Craig R. Anderson, Esq.

11 Nevada Bar No. 6882

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13 Nevada Bar No. 8996

14 Jackie V. Nichols, Esq.

15 Nevada Bar No. 14246

16 10001 Park Run Drive

17 Las Vegas, Nevada 89145

18 Attorneys for Respondent Las Vegas

19 Metropolitan Police Department

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S OPPOSITION TO PETITIONERS' JOINDER TO OPENING BRIEF IN SUPPORT OF AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NEV. REV. STAT. § 239.001/PETITION FOR WRIT OF MANDAMUS (EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.001)** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 16th day of January, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:³

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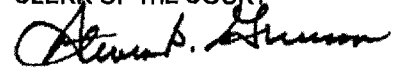
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An employee of Marquis Aurbach Coffing

³ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT E



RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AMERICAN BROADCASTING	)	
COMPANIES, INC.,	)	
	)	CASE NO. A-17-764030-W
Plaintiff,	)	
	)	
vs.	)	DEPT. NO. II
	)	
LAS VEGAS METROPOLITAN POLICE	)	
DEPARTMENT,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE

WEDNESDAY, FEBRUARY 7, 2018
RECORDER'S TRANSCRIPT OF HEARING
AMENDED PETITION

APPEARANCES:

For the Plaintiff:	JOEL E. TASCA, ESQ.
For the Defendant:	NICK D. CROSBY, ESQ.
	JACQUELINE NICHOLS, ESQ.
For the Petitioner:	Margaret A. McLetchie, ESQ.

COURT RECORDER: DALYNE EASLEY, DISTRICT COURT

TRANSCRIBED BY: MATTHEW KENNEDY, CSR No. 13822

1 LAS VEGAS, NEVADA, WEDNESDAY, FEBRUARY 7, 2018

2 [CASE CALLED AT 9:02 A.M.]

3 *****

4 THE COURT: -- versus Las Vegas Metropolitan
5 Police Department, case A-17-764030 consolidated with
6 A-17764169. Please state your appearances for the record.

7 MS. MCLEITCHIE: Good morning, your Honor.
8 Maggie McLetchie for the Las Vegas Review Journal.

9 MR. TASCA: Joel Tasca, your Honor, for all the
10 other Petitioners besides the Las Vegas Review Journal.

11 MR. CROSBY: Good morning, your Honor.
12 Nick Crosby on behalf of the Las Vegas Metropolitan
13 Police Department.

14 MS. NICHOLS: Good morning, your Honor.
15 Jackie Nichols on behalf of the Las Vegas Metropolitan
16 Police Department.

17 THE COURT: Very good. So this is the petition of
18 American Broadcasting Corporations or Companies, et cetera, to
19 obtain public records from Las Vegas Metropolitan Police
20 Department.

21 The Plaintiffs -- the Petitioners may proceed first with
22 argument.

23 MS. MCLEITCHIE: Thank you, your Honor. I'd like to
24 start by just explaining the context of where we are.

1 At this stage there are no further state charges
2 contemplated. Sheriff Lombardo has made that clear. Nobody
3 will ever be charged in state court because Mr. Paddock is
4 deceased and there are no other suspects with regard to state
5 charges.

6 While in this case Metro has pointed to a federal
7 investigation as indicating the need for confidentiality, I'd
8 also like to point out that since our briefs were filed the
9 federal -- a federal investigation has resulted in the filing
10 of charges, and there is another suspect with regards to -- I
11 think it's a manufacturing of weapons charges. So that --
12 that is no longer -- that is no longer just in the
13 investigative process.

14 Further, a lot of information has been released to the
15 media and to the public in general. A report was issued by
16 the Las Vegas Metropolitan Police Department. Both -- three
17 courts have now recognized the importance of public access
18 with regards to information regarding October 1st and have
19 rejected efforts in wholesale secrecy like the efforts that
20 Metro is engaging in in that case.

21 First, a federal judge unsealed almost all federal
22 warrant material -- federal warrant applications. Second,
23 Judge Kadish with small exceptions unsealed state court
24 warrant materials. And third, Judge Timothy Williams ordered

1 autopsy records of -- of Paddock and other records released
2 subject to redactions for the victims of October 1st pursuant
3 to the Nevada Public Records Act. I do have a copy of
4 Judge Williams' order if the Court would like it.

5 THE COURT: You may -- you may provide that. Hand
6 it to the marshal, please.

7 MS. MCLEITCHIE: And that -- that order did address
8 different types of records. It addressed autopsy records, but
9 it -- but it recognized the importance of transparency with
10 regard to October 1st and balanced similar claims made by the
11 coroner's office as they're being made by Metro in this case.
12 And I just want to point out that nobody -- none of the media
13 entities in this case are questioning the important role of
14 law enforcement in responding to October 1st nor is anybody
15 downplaying the horrific tragedy that October 1st was and is,
16 but transparency doesn't make -- isn't less important because
17 there was such a horrible tragedy. In fact, there's been a
18 lot of conspiracy theories abounding, and it's the media's
19 view that providing actual documents, not just press
20 conferences and reports by Metro, can help lessen those
21 conspiracy theories.

22 The public has a right not just to have Sheriff Lombardo,
23 while we appreciate it, come forward and give press
24 conferences and provide reports. The public has a right to

1 assess documents for itself and to assess the facts.

2 Precisely because this matter will never become an actual
3 criminal matter in state court, the need for transparency is
4 even greater. The public won't have the benefit of a criminal
5 trial to get a vetting of the facts underlying October 1st.

6 And I do want to point out that in the context of other
7 kinds of documents the United States Supreme Court has
8 recognized the significant importance and the therapeutic
9 value of public information in the wake of tragedies. So did
10 another -- a federal court in connection with the Laughner
11 (phonetic) case and warrants in -- in that case.

12 Your Honor, the interest of the Las Vegas community, the
13 victims and their families and transparency is not diminished
14 because Paddock happened to shoot himself and we don't have a
15 criminal defendant. Producing the records will further the
16 democratic aims of Nevada Public Records Act.

17 The Nevada Public Records Act goes further than FOIA. It
18 goes further than many other states' Public Records Act. And
19 it states in the actual text of the act itself, which is
20 unusual -- it states -- it states its legislative intent and
21 mandates for court and governmental entity interpretation. It
22 states in the body of the NPRA that its aim is to further
23 transparency and democratic principles. It states that any
24 restriction on public access has to be construed narrowly and

1 that -- that all aspects of the NPRA, the Public Records Act,
2 are supposed to be interpreted in a manner to further public
3 access.

4 We're -- the Las Vegas Review Journal is seeking a number
5 of records. We also join in the other Petitioner's request
6 for materials such as body cam materials. Specifically, the
7 RJ is seeking logs of 911 calls and dispatch information both
8 to Metro and to fire departments and other emergency -- and
9 other emergency services. We're also seeking information
10 regarding weapons obtained, and we're also seeking purchase
11 orders and no-bid contracts that were entered on or around
12 October 1st.

13 With regards to these requests and requests by other
14 media entities, Las Vegas Metropolitan Police Department has
15 engaged in an effort to avoid the application of the NPRA
16 entirely. First, Metro failed to respond timely, if at all,
17 to some of the requests. And we do understand October 1st was
18 an unprecedented event. Law enforcement officials were busy,
19 but now three months have gone by. Even in their opposition
20 to our brief they fail to provide the specificity that by law
21 they should have provided five days after the requests.

22 Another effort that Metro makes to try to avoid the
23 application of the NPRA that this Court should not entertain
24 is -- is contending that a state -- Nevada -- a state

1 administrative code -- the Nevada Administrative Code applies
2 that doesn't. It's an administrative code that only applies
3 to state agencies, and what's important about that is the
4 state agencies to which that administrative code applies
5 actually post information on their websites explaining how to
6 make requests consistent with -- with the administrative code
7 at issue. Metro does not do that. In fact, there's
8 conflicting information on their website.

9 Another effort that Metro is engaging in is to now ask
10 for an in camera submission. It's our position that it's too
11 late. The Nevada Public Records Act requires that matters be
12 handled in expeditious fashion. They should have responded
13 with specificity within five days. In addition, they should
14 have provided all their arguments in connection with their
15 opposition. If at that stage they wanted to produce documents
16 in camera, that was their opportunity to do so. In addition,
17 if they were going to do so, Petitioners have a right not to
18 be litigating in the dark, and we certainly should have had
19 more information and the kind of information and the kind of
20 arguments that Metro put forth in its opposition.

21 It's our position that Metro failed -- because they
22 failed to timely respond to many of the requests, any
23 arguments that they make now are waived, and this is important
24 because NRS 239.01071(d) requires that law -- that law

1 enforcement and any other governmental entity that receives a
2 public records request respond in a number of ways. All of
3 those ways that it's allowed to respond -- it can pick
4 whichever one is appropriate under the circumstances, but it
5 has to do so within five days. And there's a provision that
6 says that if they intend to with -- withhold them because
7 they're confidential -- that's 1(d) -- that they have to cite
8 authority and give specific reasons for the denial within that
9 five days.

10 And two other departments in this court -- they're not RJ
11 orders. They're court orders -- have -- have found -- have
12 found this argument to have merit and have found that if a
13 governmental entity does not respond within five days, then --
14 then they have -- then they've waived arguments. Metro's
15 argument in response to that is that our remedy is to go to
16 court, but that's -- that's not how this is supposed to work.

17 When a -- when a governmental entity gets a public
18 records request, they're supposed to respond meaningfully,
19 your Honor. And we shouldn't have to go to court just to get
20 a meaningful response, just to get them -- just to get them to
21 answer and explain why they're withholding the information.
22 The purpose of coming to court is to resolve any claims of
23 confidentiality over which the parties disagree. And again,
24 the language in NRS 239.0171(d) is mandatory. It says that a

1 governmental entity shall respond in a number -- it can
2 respond in a number of ways, but it must pick one of those
3 ways and do so in timely fashion.

4 With regard to what kind of legal test applies, there is
5 something that the parties all agree to, and that's that these
6 records are not confidential by statute. Because they're not
7 confidential by statute, then we apply a balancing test.
8 Pursuant to that balancing test, Metro has a very, very heavy
9 burden. They must prove by a preponderance of the evidence,
10 your Honor -- and the evidence is important because we have no
11 evidence -- that the records are confidential or privileged,
12 and they must also prove that the interest in non-disclosure
13 outweighs the strong presumption in favor of access. This is
14 the test that applies, not the test based -- not one based on
15 the test of the federal -- federal FOIA law or one based on
16 New York law. Further, it's important to point out that while
17 some other jurisdictions might apply different balancing tests
18 when they have explicit privacy exemptions in the applicable
19 law, we do not have that privacy exemption in our -- in our
20 Public Records Act, and there is no burden shifting back to us
21 under the NPRA.

22 And it's very clear and very important I think both in
23 the text of the NPRA and in Nevada Supreme Court case law
24 interpreting the NPRA that there's a presumption in favor of

1 access. What that means, your Honor -- and I think it's -- I
2 think it's consistent with the First Amendment rights of
3 Petitioners who are all media entities. No media entity or no
4 other member of the public has to explain to the governmental
5 entity why they want the record or why they're deserving of
6 the record. Instead, the government has to establish some
7 claim of confidentiality by a preponderance of the evidence
8 and explain how that claim is confidential, if they -- if they
9 even establish it applies -- how that outweighs the heavy
10 presumption in favor of access.

11 In order to meet that burden, your Honor, they can't
12 speculate. Courts have made clear that hypothetical claims
13 of -- hypothetical claims of harm are not sufficient to
14 outweigh the presumption or meet the legal test. Indeed, they
15 have to show that each document or the part thereof that
16 they're trying to protect is confidential and why. We had
17 asked them to produce a log. They refused to do so. All
18 they -- all they provided in their papers are conclusory
19 hypothetical arguments that these might harm an investigation.

20 The other thing that they failed to do -- and this is
21 again relevant to the burden. They -- they failed to explain
22 how lesser measures could have protected any actual concerns
23 they have with wholesale production of the documents. It's --
24 it's explicitly stated in the statute that they have a duty to

1 redact and make as much of the public record available to the
2 public as possible, and they have failed to even entertain
3 redacting.

4 With regard to the other arguments that they make against
5 disclosure, your Honor, they rely on a -- I think it's a
6 Washoe internal City Attorney memo. Obviously that's not law.
7 And I think that the reliance on that memo reflects the -- the
8 misplaced reliance on Donrey, which importantly, your Honor,
9 they ordered disclosure in the Donrey case. While
10 governmental entities often rely on Donrey because it does
11 allow for a balancing test even if a record isn't explicitly
12 confidential by law, it's also important to note the Nevada
13 Supreme Court rarely says that a record is not a public
14 record. And even in the Donrey case where they said, "Okay,
15 governmental entities. Even if it's not expressly
16 confidential, we will engage in this balancing test" -- in
17 Donrey, they applied the balancing test and the governmental
18 entity lost and the records were ordered disclosed.

19 But the law -- the -- the criminal investigation
20 discussion in some of the Nevada Supreme Courts is very
21 different from the facts that we have at hand. In those cases
22 they were talking about potential implications for an actual
23 defendant's trial rights. Metro has not explained how this
24 would actually -- actually impact any investigation, how it

1 would make it harder for them to do the investigation, and the
2 kinds of discussion they had in Donrey about the potential --
3 potentially allowing for non-disclosure in the context of an
4 investigation was based on certain -- certain assumptions like
5 the fact that there would be a criminal defendant facing
6 trial. As I pointed out, there will never be any state
7 charges regarding 1 October.

8 With regard to the 911 calls, Metro has no authority for
9 wholesale denial. Both we and the other Petitioners cited a
10 number of cases from other states wherein the -- the courts
11 have ordered full disclosure of 911 calls.

12 The other Petitioners also pointed out what happened
13 after a similar horrific event, although no horrific event is
14 alike: The Pulse Nightclub shooting. About a few months
15 after that event -- now we're a number of months past
16 October 1st -- those records were produced -- the 911 calls.
17 And I did want to point out -- and I have a copy for the Court
18 if I may give it to the marshal.

19 THE COURT: You may.

20 MS. MCLECHIE: The case that they rely on -- the
21 single authority that they have cited for the -- for
22 supporting their argument that the 911 calls should be denied
23 in its entirety is a case from New York. First of all,
24 New York much like FOIA -- the actual statute includes a

1 privacy exemption, so that's an important distinction.

2 In addition, while they -- Metro represents that this --
3 that they were -- that the media entities were denied access,
4 in fact they were -- based on the explicit statutory private
5 exemption, which we don't have here, that court did allow for
6 redacted versions of those 911 calls to be produced. And so
7 that case -- that case is very different from this case
8 because it involved a statutory privacy exemption and -- first
9 of all. And second of all, even there -- and that's the only
10 case they have. We have a number of cases where 911 calls
11 have been ordered produced, and even there they were ordered
12 in redacted form.

13 Another example of a failure for their failure to meet
14 their burden is with regard to the purchase orders and no-bid
15 contract documents that the RJ is seeking -- is seeking.
16 Metro has asserted that they could disclose techniques and
17 procedures of the department, but they haven't explained why,
18 and Nevada Supreme Court has explicitly said that speculation
19 is not sufficient to merit non-disclosure. They have a heavy
20 burden to make -- burden to meet, your Honor. It's one that
21 requires a preponderance of the evidence. They can't just
22 say, "Open law enforcement investigation." They can't just
23 say, "We're law enforcement, and we do an important job,"
24 which they do, but that is not enough to overcome the

1 presumption in favor of access, your Honor.

2 THE COURT: Well, thank you.

3 MS. MCLEITCHIE: Thank you.

4 THE COURT: Is there any joining party that wishes
5 to speak?

6 MR. TASCA: We have nothing to add at this time,
7 your Honor.

8 THE COURT: All right. Very well. Then let's hear
9 from the Respondent.

10 MR. CROSBY: Good morning, your Honor. Thank you.
11 The department does not dispute the importance of the Nevada
12 Public Records Act. It does not discredit or otherwise dilute
13 the interests of the public at large as well as victims and
14 those affected, which is this entire community and the world
15 for that matter -- importance and a desire to have
16 transparency, A, in government, and B, more particularly with
17 respect to the nation's largest mass shooting in history.
18 That is not disputed.

19 The language of Nevada Revised Statute chapter 239 is not
20 disputed. The department doesn't dispute that the Nevada
21 legislature has declared that the policy for this state is
22 that public records are to be public. What this case is
23 about, your Honor, is the timing of when those records should
24 and can be disclosed. And while I appreciate Counsel's

1 representation that the Las Vegas Review Journal was mindful
2 of what my department's officers were going through during
3 October 1 after 10:06 and continuing for several weeks after,
4 the reality is we're here on whether or not the department's
5 rejection or refusal to provide documents at the time they
6 were made pursuant to Nevada Revised Statute chapter 239 was
7 appropriate.

8 At 9:30 in the morning -- actually, at 9:12 in the
9 morning on October 2nd, less than 12 hours after 58 people had
10 been shot, the Las Vegas Review Journal requested all 911
11 calls. Less than 12 hours after the nation's largest mass
12 shooting. 18 minutes later the Las Vegas Review Journal at
13 9:30 a.m. requests all log and call slips for all emergency
14 calls associated with -- within that range on The Strip less
15 than 12 hours after this. Quite candidly, the men and women
16 of the Las Vegas Metropolitan Police Department I'm assuming
17 12 hours after that incident had no idea what was going on,
18 what to do, and what we were going to do because we had
19 hundreds of people dead or injured. 58 people dead and a
20 crime scene that spanned two blocks essentially of the
21 Las Vegas Strip.

22 October 2nd at 2:05, the Las Vegas Review Journal asks
23 for any and all 911 calls from the incident. That's 14 hours
24 after this happened. They want every single call we received.

1 On October 2nd, ABC at 11:22 in the morning -- so 13 hours
2 after the incident -- wants all body worn camera, dash cam
3 footage, closed circuit television, all recordings, radio
4 traffic, and all police reports. At this point in time we
5 don't have police reports ready. We don't have this
6 information. It does not exist.

7 October 3rd -- or sorry. October 4th, ABC at 9:01 in the
8 morning asks for all 911 audio recordings. October 3rd at
9 5:53, all records regarding Paddock, 911 dispatch calls,
10 evidence logs, hotel surveillance video, body worn camera,
11 interview reports -- anything related to this shooting.

12 THE COURT: So you're raising a timing argument.

13 MR. CROSBY: That would be the essence --

14 THE COURT: You require --

15 MR. CROSBY: Sorry.

16 THE COURT: You believe production was required
17 within -- I'm sorry -- was not required within five days.
18 Obviously we've had a significant amount of time. We're now
19 three months from the date of the incident. I'm sure that
20 you're not saying that since you couldn't comply within five
21 days that you have no longer the right or the responsibility
22 to produce those records now.

23 MR. CROSBY: Absolutely not, your Honor. And first,
24 just for --

1 THE COURT: So isn't that -- isn't that irrelevant
2 then in determining whether you complied with the five-year
3 rule -- or the five-day rule?

4 MR. CROSBY: Well, first, Nevada Revised Statute
5 239.0107 is not a five-day rule to produce the documents.
6 It's a five-day rule to provide a response to the request, not
7 the actual documents. So if you look under 239.0107 --

8 THE COURT: Right.

9 MR. CROSBY: -- subsection 1(c) or subsection 1(d),
10 if the government is going to deny the request, for example,
11 based upon confidentiality, it has to give notice of that
12 fact.

13 THE COURT: Right.

14 MR. CROSBY: And it cites specific --

15 THE COURT: But your responses -- I took a look at
16 your responses. They had a blanket assertion that the records
17 were confidential and a blanket assertion that the records
18 sought were part of an ongoing investigation.

19 MR. CROSBY: Correct. And they were.

20 THE COURT: Do you think that that is a sufficient
21 response within five days?

22 MR. CROSBY: Absolutely, your Honor. I think that
23 the department's response which cited legal authority to -- to
24 include among others the Donrey versus Bradshaw case as well

1 as an explanation as to why it's the department's belief that
2 as a matter of law at that point in time when we received
3 those it was an ongoing investigation -- and quite frankly,
4 12 hours after the incident happened, that -- you cannot -- no
5 one -- I don't think Counsel is going to say that -- that on
6 October 2nd, October 3rd, 4th, it was not an active ongoing
7 investigation and --

8 THE COURT: Suppose you're right, we're now three
9 months past the date of the incident.

10 What's your position on the extent of the ongoing
11 investigation now?

12 MR. CROSBY: Currently, your Honor, the department
13 is -- it is an active investigation in the sense that we are
14 completing the investigation into the shooting. Is there
15 someone who's going to be charged for the shooting? No. The
16 sheriff has gone before the -- the press and stated as much,
17 but it doesn't stop our need to complete a criminal
18 investigation.

19 Furthermore, there is an active criminal proceeding that
20 is currently going forward with respect to Mr. Haig which
21 was -- recently a criminal complaint was filed, and that was
22 the person who was erroneously disclosed from
23 Judge Kadish's case with respect to the search warrant issue.
24 So we do have an active criminal proceeding going on with the

1 FBI or the United States federal government doing that case,
2 but the department --

3 THE COURT: So let me interrupt again.

4 MR. CROSBY: -- is doing an investigation.

5 THE COURT: Why -- let me interrupt again. Why
6 didn't Metro specify the manner in which the production of
7 these documents would hinder the remaining portion of the
8 ongoing investigation?

9 MR. CROSBY: You know, candidly, your Honor, for
10 example, when we responded on October 3rd at 1538 hours to
11 ABC's response with respect to all body worn camera, dash
12 (inaudible) circuit, all recordings, I don't think anyone knew
13 what was going on at that point other than triaging what
14 happened on The Strip that night at the Route 91 Festival. So
15 to place a burden on the department to articulate a legal
16 basis when we're dealing with hundreds of people injured in a
17 mass criminal investigation budding and flourishing starting
18 12 hours, I don't think it's reasonable to expect the
19 department to articulate in a legal fashion every single
20 aspect as to why those documents at that point in time
21 couldn't be provided because for one we didn't know what
22 documents we had that were responsive to that request on
23 October 2nd or October 4th.

24 THE COURT: So three months later, do you now have

1 the specificity to explain why production of these documents
2 would interfere with the narrow ongoing investigation?

3 MR. CROSBY: Yes to the extent, your Honor, that the
4 department is conducting its investigation into this -- into
5 the -- the case. We don't stop an investigation because there
6 isn't going to be someone charged. That would be like every
7 murder-suicide that occurs in this valley. We walk in and
8 say, "Oh, he or she is dead by homicide," or, "He or she is
9 dead by suicide. No need to do an investigation." We just
10 close it out.

11 It's still an active investigation. And in that
12 situation -- a murder-suicide -- where we know there's going
13 to be no other suspects, we still complete the investigation.
14 Those records would not become public until such time as that
15 criminal investigation is complete, which is what Donrey
16 contemplates.

17 And I find the irony in Counsel's suggestion that the
18 department's reliance or references to the City of Sparks'
19 memorandum is misplaced or faulty. Both counsel for
20 Petitioners cited that very memo in their petitions. That's
21 what they relied upon with respect to declaration these
22 matters are public record.

23 And I think it's also important to note that the Nevada
24 Public Records Act contemplates public records. It doesn't

1 contemplate evidence, so evidence the department or any public
2 entity receives in the course of a criminal investigation does
3 not transmute that property into a public record. For
4 example, in the murder-suicide I talked about --
5 hypothetical -- if a gun was used, the gun now doesn't become
6 a public record. The department took possession of it as a
7 matter of evidence.

8 We're dealing with reports is what we're dealing with.
9 We're dealing with in this case 911 calls, and we're dealing
10 with body worn camera footage of the department. But
11 disclosing this information, A, there's a pragmatic hurdle,
12 you know, ultimately that has to -- has to be overcome. But
13 while the department's investigators are combing through all
14 of this evidence to piece together a complete final report,
15 there is a significant interest in allowing the department to
16 do its job and look at that evidence without the taint
17 (phonetic) of disclosure coming through with people
18 interpreting those -- those documents prior to our final
19 report.

20 We had -- the sheriff did release a preliminary report.
21 It was the first time in history that has happened that I'm
22 aware of, and I believe the sheriff represented the same. And
23 I thought that was a fairly robust report that the sheriff
24 wanted to put forward so people could have some information as

1 we moved through this process, but that is a stark difference
2 than us turning over, A, source documentation that is
3 evidence, but B, every single report related to this incident.
4 We had so many officers respond to this incident. The
5 magnitude -- excuse me. The magnitude of this investigative
6 effort is unprecedented. It's my understanding that from a
7 federal perspective the FBI had more people on this event than
8 any other event in history.

9 Again, back to the timing of this incident. We look at
10 this, the argument that the department waived its right or
11 waived any challenge it has with respect to these records
12 requests that were identified that were not responded to
13 within the five-day period outlined in 239.0107 subsection 1.
14 I get it. There's an argument to be made, but there's also
15 discretion within the Court to interpret that response or
16 untimely response given the positioning and timing of these --
17 of these requests and what was going on at the time when we
18 get these requests nine hours after this happened. People
19 haven't even died at that point. So to that -- to that
20 extent, I don't believe the department waived its defense.

21 But more -- probably more importantly, if -- if the Court
22 were to find the department in those instances did waive some
23 challenge, the remedy is what we're here today -- is an order
24 to produce documents. There's no actual remedy or actually

1 order to come to court to seek an order for these documents.
2 There's no other remedy outlined in Nevada Revised Statute
3 231 -- chapter 231 and --

4 THE COURT: Well, the statute is designed to permit
5 the press to obtain those records pursuant to statute
6 without -- without the need to go to court, so going to court
7 is the last resort if Metro fails to produce the records.

8 MR. CROSBY: Agreed.

9 THE COURT: It's not as if they can request the
10 documents and then you escape any responsibility by having a
11 blanket assertion of confidentiality as that would be in
12 violation of chapter 239. Coming to court is merely their
13 last resort to try to get what they believe was discoverable.

14 MR. CROSBY: And I don't necessarily disagree
15 with -- with most of that interpretation of the statute,
16 your Honor. But again, when we take a look at the facts of
17 this case, we have to identify the -- or we have to pay
18 attention to the timing of what was requested and when the
19 response was made. And the department has never said that it
20 will never produce these documents -- these -- or these public
21 records. It has never said that. In fact, in its responses
22 it provided a time frame vaguely in the sense that it said
23 when the investigation is complete or when the investigation
24 closes.

1 THE COURT: Who makes that determination when the
2 investigation is complete?

3 MR. CROSBY: In this particular case, your Honor, I
4 would suspect that would be our critical incident review team
5 who in conjunction with the force investigation team is doing
6 the investigation. I would suspect it would be -- that
7 detail -- once it releases or once it publishes its final
8 report, which would be the complete version of the preliminary
9 investigative report that was disclosed by the department,
10 that would be when the case closed provided that nothing else
11 comes out in the sense of a criminal proceeding, which I don't
12 see occurring with the exception -- again, there is an active
13 criminal proceeding with respect to Mr. Haig in the federal
14 case, which obviously any -- any references to evidence
15 related to that particular case -- well, not evidence. Any
16 documents related to the evidence of that particular case I
17 would argue could not be disclosed because that under Donrey
18 is a criminal proceeding, and disclosure of that could
19 jeopardize Mr. Haig's right to a fair trial. And therefore,
20 the department has an overriding interest that outweighs the
21 public need of disclosure with respect to that particular
22 information.

23 Again, your Honor, we're dealing with -- this case was
24 filed on November 2nd I believe, so one month and a day after

1 the incident occurred. And the department did provide
2 responses to many of the -- of the requests candidly that were
3 requests that were not responded to. And again, given the
4 backdrop of the magnitude of this case, I think it is
5 understandable what the department's responses and to some
6 extent -- that didn't have a response -- the non-responses
7 are, but it is a matter of when we can get this information
8 out. And it's the department's -- it's been the department's
9 position once this investigation is completed, then the
10 department is going to make the public records available,
11 which is essentially the normal course for the department.

12 When you're doing a criminal investigation, those
13 documents don't get released until such time as we complete
14 our investigation. And that's -- that is in harmony with the
15 Public Records Act, and it makes sense from a pragmatic sense.
16 The challenge here, your Honor, again, is the magnitude of
17 information in this case that the department has received.
18 The amount of man and woman hours that went into this
19 investigation, that continues to go into this investigation is
20 unprecedented in the history of this department. And quite
21 honestly, I would speculate it's probably unprecedented in the
22 history of this country absent 9/11 or perhaps the Oklahoma
23 City bombing.

24 Again, it's not a matter of the department saying,

1 "You're not going to ever get any of this information."
2 It's -- the department needs time to complete the criminal
3 investigation at which time those records that are public
4 records will be disclosed. And in fact, I believe the idea is
5 it probably would be like a -- a publication or disclosure
6 that everyone can access that seems to make the most sense,
7 but we need to finish our criminal investigation. I believe
8 the sheriff has represented that it's his goal to get this
9 done by the end of the year which I think actually means, you
10 know, by the -- a year from the incident, which I don't think
11 is unreasonable given the amount of information -- the amount
12 of information involved in this case.

13 You know, when we shut down the Las Vegas Strip for a
14 week to conduct a criminal investigation to include finding
15 bullet fragments and bullets and trajectory impact -- you name
16 it. In a microcosmic sense, if I shoot one bullet into this
17 room, there's a whole lot of stuff that goes into determining
18 that bullet -- where it went, what it did, and who shot it.
19 You times that by the hundreds and you multiply the victim --
20 the number of victims and you have a very gigantic criminal
21 investigation that we are completing.

22 And again, there's an active criminal proceeding with
23 respect to Mr. Haig, but no. No one is going to be charged
24 for the murders of these people or the attempted murders of

1 everybody else, but that doesn't excuse the department's
2 obligation to complete a thorough investigation -- criminal
3 investigation for purposes of closing out this case which at
4 the end of the day assists everybody interested in knowing
5 where this information is because if we didn't complete the
6 investigation, nothing would be done and everyone can just
7 look at whatever happened -- generated on October 4th if we
8 don't do any investigation.

9 THE COURT: So you say that this investigation might
10 go on through the end of the year. That's another 11 --
11 11 months.

12 Doesn't the public have a right to know that its -- its
13 government is doing its job? That they're safe? That the
14 government officials are acting responsibility -- acting with
15 proper responsibility?

16 MR. CROSBY: I don't -- I don't deny that that is
17 embodied in the case law, not necessarily interpreted in
18 Nevada Revised Statute 239 but public records in general. But
19 again, it goes back to when the -- or when the public can have
20 those documents to have that access, to do those checks and
21 balances, to do that interpretation and that analysis.
22 That's -- that's not something the department is disputing.
23 It's a matter of timing as to when that can occur.

24 THE COURT: All right. Thank you.

1 MR. CROSBY: Thank you, your Honor.

2 THE COURT: Anything else?

3 MR. CROSBY: No, your Honor.

4 THE COURT: All right. Thank you for answering my
5 questions. I appreciate that.

6 All right. Now let's hear from the Petitioner,
7 Ms. McLetchie.

8 MS. MCLETCHIE: Thank you, your Honor. I just want
9 to go through a few points. First, with regard to Metro's
10 comments that they don't question the importance of
11 transparency or the Public Records Act, they then go on to
12 criticize the media outlets for making public records
13 requests. And I just want to make clear that those requests
14 were not made directly to Metro officers or first responders
15 or people on the scene. So the idea that media outlets were
16 trying to interfere with the workings of law enforcement --
17 the lawyers for Metro certainly could have been available to
18 make responses to the Public Records Act request.

19 So there's nothing -- there's no -- there's also no mass
20 tragedy or high magnitude event exception to the Public
21 Records Act. In fact, as I previously argued, it's
22 Petitioner's view that the extreme nature and the horrific
23 nature of the tragedy only further -- furthers the need for
24 more transparency. The idea that Sheriff Lombardo has

1 published a report and that's good enough just isn't the case.
2 Again, while we appreciate the -- the report, we appreciate
3 the press conferences, the public has a right to assess the
4 actual facts for itself.

5 With regard to the discussion of 239.0107(d) that sets
6 forth what law enforcement or any other governmental entity
7 must do, shall do within five days of a public records
8 request, again, there's no exemption for law enforcement.
9 There's no exception that if the event is serious enough they
10 get -- they get an extension on that.

11 One of the things you can do is say, "Yes. I will give
12 you all the records. I can't do it within five days. Here's
13 a date certain by which I will give you the records."

14 Metro did not do that. And in fact, today they --

15 THE COURT: Well, how can they give you a date
16 certain? Any investigation is fluid.

17 MS. MCLEITCHIE: That's correct, your Honor. But if
18 they're going to -- they didn't say, "We're absolutely going
19 to publish all these records as soon as the investigation is
20 complete." They've never taken that position.

21 And in fact, what Mr. Crosby just says -- just said was
22 those records that are public records will be produced. He
23 didn't say all of the records requested by Petitioners will be
24 produced, your Honor. He just said those records that are

1 public records will be produced.

2 They asserted in their response -- they didn't choose to
3 say the records will be produced at a date certain. They
4 instead asserted the position the documents were not subject
5 to the Public Records Act because of confidentiality in
6 connection with an ongoing investigation. And the problem
7 with that, your Honor, is not only is the Donrey case from
8 1990 -- 1990 -- 1990 I believe, but since the -- and since
9 then, the Public Records Act has been amended to put a more
10 heightened burden on any governmental entity resisting
11 transparency and disclosure.

12 But the Donrey case isn't authority that merits
13 non-disclosure. They're supposed to provide specific legal
14 authority for each document requested as to why they're not
15 producing it or why redactions couldn't meet the concern.
16 They have never even bothered to do that let alone to consider
17 redacting to meet any concerns, and now it's too late. They
18 haven't met their burden, and the records have to be -- have
19 to be produced.

20 What the -- what the Court said in Donrey was we're going
21 to apply this balancing test. The burden that's applicable to
22 that balancing test has been strengthened since that time, but
23 it did not say what Metro pretends it says. Donrey does not
24 say, "As long as law -- as long as law enforcement says

1 there's an investigation, all such records are confidential."
2 There is no such bright line -- there is no such bright line
3 rule.

4 In that case they were dealing with a closed
5 investigation, and so the Court said, "There is no pending or
6 anticipated criminal proceeding. There are no confidential
7 sources or investigative techniques to protect. There is no
8 possibility of denying someone a fair trial, and there is no
9 potential jeopardy to law enforcement personnel." So they
10 were explaining why in that case the law enforcement
11 investigation records were -- were discoverable, if you will,
12 under the Public Records Act, but they never said in that case
13 that any time you have an investigation that the records are
14 confidential.

15 In fact, if you look at the factors that they set
16 forth -- and they apply in this case, too. Just like in this
17 case, there is no pending or anticipated criminal proceeding.
18 While they point to the federal charges that were recently
19 filed, they've never explained exactly how it would affect
20 those criminal proceedings, and they certainly don't have
21 standing on behalf of the United States government.
22 Mr. Crosby is not representing the federal government in this
23 case to -- to -- to explain why the records are confidential.
24 In fact, in a federal warrant unsealing case, the

1 U.S. attorneys joined in our motion to unseal the warrant
2 affidavits and recently filed their own motion to unseal
3 returns that include inventories.

4 The other factor in the Donrey case that the Court
5 said -- said might weigh in favor of non-disclosure -- they --
6 they said in that case there's no confidential sources or
7 investigative techniques to protect. They have not explained
8 in this case what confidential sources or investigative
9 techniques there are to protect. They didn't try to do it in
10 camera. They didn't explain it all, how it's even possible
11 that those could be jeopardized by production of any of the
12 records at issue.

13 The Donrey court also said in that case there's no
14 possibility of denying someone a fair trial. That's true
15 here, too. We don't have any Nevada charges. And they say
16 there's no potential jeopardy to law enforcement personnel.
17 Certainly if there were -- certainly the media would not want
18 to cause any jeopardy to law enforcement personnel, but Metro
19 has not explained how on earth the production of these records
20 would cause jeopardy to law enforcement personnel.

21 And I do also just want to explain with regard to the
22 test that's applicable, in 2010 in the Reno Newspapers v.
23 Sheriff case, the Court talked about the effect of certain
24 amendments including 2007 amendments to the Nevada Public

1 Records Act including on the Donrey test. I don't have the
2 legislative history here with me, but I'd be happy to provide
3 it to the Court if it would be helpful.

4 In the legislative history, the legislature explained
5 both in 1993 and in 2007 that they were strengthening the
6 Public Records Act in part to stop exactly what Metro
7 continues to do to this day so often when they get public
8 records requests, and that's just to cite to Donrey. And what
9 the Nevada Supreme Court said in -- in 2010 after the 2007 --
10 2007 amendments, they explained those amendments and they
11 said, "The balancing test under Bradshaw now requires a
12 narrower interpretation of private or governmental interests
13 promoting confidential -- confidentiality or non-disclosure to
14 be weighed against the liberal policy for an open and
15 accessible government. We emphasize that the balancing test
16 must be employed in accordance with the underlying policies
17 and rules of construction required by the Nevada Public
18 Records Act."

19 And again, this is unusual. The legislature has seen fit
20 to explicitly set forth in the Public Records Act that
21 transparency is important and that its provisions have to be
22 interpreted broadly. Metro's practice, therefore, that it
23 doesn't provide any documents regarding an open investigation
24 is absolutely not in harmony with the Nevada Public Records

1 Act.

2 THE COURT: So question: What role does the First
3 Amendment play in the Court's expansion or the Court's reading
4 the chapter 239 more liberally in favor of production?

5 MS. MCLEITCHIE: Well, the principles that are
6 contained in the Nevada Public Records Act are the principles
7 that are inherent in transparent government and democracy.
8 And obviously the media contends that the -- the public's
9 interest and the right to know is furthered by media access to
10 the records because the media hires journalists to interpret,
11 analyze, and report on the records provided.

12 Further, courts have held that where there is a right to
13 documents, for example, in warrant unsealing cases, courts
14 have explicitly held that once it's -- once it's clear that a
15 record is a public filing or a public record in that -- in
16 that context that the First Amendment implications of any
17 denial of any delay -- even a short delay -- are -- are -- are
18 a key problem because of the restraint on the reporting
19 process. It's absolutely imperative to the media's First
20 Amendment rights that they be able to access what our public
21 records under the law without interference from
22 governmental -- from governmental interests; that governmental
23 interests do not -- entities do not use their power as holders
24 of the documents to interfere with the important role that

1 journalists have in news gathering and reporting to the
2 public, your Honor.

3 And with regard to this idea that they can just produce
4 them later at some later date and that's not good enough, that
5 isn't the case. There's an immediate right of the public to
6 have access to the records. It actually says in the Public
7 Records Act that public entities' records are supposed to be
8 available and open to the public for inspection at any time.
9 And so the idea that they can just delay and delay and delay
10 until they say their -- their investigation is done is not at
11 all -- is not at all squared with the Public Records Act.
12 They have to produce the records without delay because they
13 have not met their burden. Again, just saying an
14 investigation is not enough, just saying that they'll produce
15 whatever they think are public records when they say the
16 investigation is done is also not enough, your Honor.

17 THE COURT: All right. Thank you very much.

18 MS. MCLETCHIE: Thank you, your Honor.

19 THE COURT: I would only allow a surreply if Counsel
20 believed that there was any significant misstatement by the
21 Petitioner.

22 MR. CROSBY: If I may, your Honor. Given the
23 backdrop of the Court's prefacing the surreply, if I
24 understood Counsel's reply argument or rebuttal argument is

1 that the department never -- or said it's not going to
2 disclose the documents or never said it would disclose. I'd
3 direct the Court with respect to the -- what I would
4 characterize as the media Petitioners represented by
5 Ballard Spahr -- Exhibit 1 Bates stamped page media 1,
6 Exhibit 2 Bates stamped page media 3, Exhibit -- can't read my
7 handwriting -- 3 Bates stamped media 4, Exhibit 5 Bates
8 stamped media 7.

9 THE COURT: Okay.

10 MR. CROSBY: And with respect to Review Journal, for
11 example, Exhibit 5 to the Review Journal's opening brief all
12 identify the department's responses which stated they will --
13 once the investigation closes, they'll make them available.

14 And I think for my housekeeping, with respect to -- if I
15 may, your Honor, it's not with respect to Ms. McLetchie's
16 reply, but it's a jurisdictional issue in a sense.

17 THE COURT: I'll -- I'll allow it.

18 MR. CROSBY: The Washington Post, WP Company, in
19 this case never identified an actual request that it made.
20 And we identified that in our briefing, and there was no
21 response demonstrating that it actually made a public records
22 request. Therefore, The Washington Post or WP Company, DBA
23 Washington Post, has no standing in this case right now.
24 Thank you, your Honor.

1 THE COURT: Thank you. So I prepared pre-hearing
2 notes which I have modified in light of the argument this
3 morning, so please permit -- permit me the right to read my
4 notes. Thank you.

5 So first and foremost, Metro officers and all other
6 public safety officers must be praised for their courage,
7 bravery, and resourcefulness in protecting the public and
8 conducting its investigations, but this petition is not about
9 the conduct of Metro. This petition is about public access to
10 public records so that the purposes of the Nevada Public
11 Records Act as well as the First Amendment may be achieved.

12 Let's talk about the documents requested. Plaintiffs
13 demand that Las Vegas Metropolitan Police Department produce
14 several categories of documents on the grounds that such
15 documents are public records. What I can glean from the
16 documents here -- that the records that the Plaintiffs seek
17 include the following: 911 calls, body camera data, as well
18 as dash cams, CCTV videos, evidence logs, dispatch
19 information, interview reports, search warrant returns.

20 Incidentally with regard to search warrant returns, this
21 Court is going to adopt the ruling of Judge Kadish with
22 respect to disclosures of -- of any warrant material. We have
23 affidavits of probable cause, we have purchase orders and
24 no-bid contracts, and we have information on weapons obtained.

1 That's all the information that's being sought by the
2 Petitioners.

3 Defendants have not expressly denied that all these
4 records are public records under NRS chapter 239. The parties
5 have competing positions here. Metro has opposed production
6 of the requested records on the grounds that they are
7 protected due to personal privacy, confidentiality, or ongoing
8 investigation.

9 The Nevada Public Records Act was codified in NRS chapter
10 239. This act provides that public records must be made
11 available to the public for inspection or copying. The
12 purpose of this act is to foster democratic principles by
13 providing members of the public with access to inspect and
14 copy public records to the extent permitted under Nevada law.

15 The Nevada Public Records Act as well as the First
16 Amendment to the Constitution provides the press with the
17 ability to obtain and publish information about issues that
18 affect the public interest, about the conduct of government
19 officials, and provides the press with the tools to ensure
20 that the government is responsible and efficient.

21 Furthermore, they provide the press with the tools that assist
22 the public in holding its government accountable.

23 Government records are presumed to be public records.
24 Any restriction to the public's right of access to public

1 records must be narrowly applied. The standard here -- the
2 government bears a heavy burden in preventing disclosure of
3 public records. The government must satisfy a two-part test.

4 First, the government must establish by a preponderance
5 of the evidence that the records are confidential. Second,
6 the government must prove that its interest in non-disclosure
7 outweighs the public's interest in access. In doing this
8 balancing, the Court understands that there is a presumption
9 of public access. Also in doing this balancing test, the
10 Court is mindful that the timing of the request is entitled to
11 some weight.

12 Waiver. Before the Court reaches the merits of the
13 petition, the Court must address the issue of waiver asserted
14 by the Respondents. The Respondents -- I'm sorry. By the
15 Plaintiffs. The Plaintiffs contend that Metro waived its
16 right to withhold any records because Metro failed to timely
17 respond to the records requests within five days or failed to
18 provide the grounds for withholding specific records and
19 specific reasons. The Court rejects the Plaintiffs' waiver
20 argument.

21 Extraordinary circumstances here made it difficult for
22 Metro to respond sooner. Metro did act promptly. Plaintiffs
23 sought massive quantities of documents. Several different
24 entities sought different groups of documents, and the

1 Plaintiffs' requests would have required an incredible amount
2 of time and resources while Metro was deeply involved in its
3 investigations. So under these circumstances, there was no
4 implied or express or statutory waiver due to the government's
5 pre-petition conduct.

6 Confidentiality. If the government contended that the
7 requested records were confidential or otherwise protected
8 from disclosure, then the government had a duty to redact
9 confidential information and produce the non-confidential
10 portions of the records. Wholesale withholding of documents
11 with the general claim of confidentiality suggests to this
12 Court that the records have not been sufficiently scrutinized.
13 A blanket protection over all categories of documents is
14 improper. A failure to redact and produce does not
15 necessarily waive the government's rights, but it is certainly
16 some evidence that exists that many records are not
17 confidential. The government had a duty to prove by a
18 preponderance of the evidence that each public record or part
19 thereof is confidential. This Court finds that the government
20 failed to meet this burden.

21 Now let's talk about objection based on a pending
22 criminal investigation. The Defendants contend that the
23 pending criminal investigation creates a strong governmental
24 interest against disclosure which outweighs any public

1 interest. The Court disagrees with that argument.

2 First, there exists no rule that records can be withheld
3 merely because they relate to an ongoing investigation. The
4 government still has the duty to show that the records of the
5 ongoing investigation are confidential. Defendant has -- has
6 already produced the preliminary report which discusses in
7 detail the investigation. The preliminary report relies upon
8 numerous public records generated in the course of the
9 investigation. The entire universe of these investigative
10 records cannot be so sensitive to bar wholesale withholding.

11 Additionally, the sheriff has publicly declared that
12 the only suspect was Stephen Paddock who is deceased. The
13 sheriff himself has also stated that it's the responsibility
14 of the government to ensure timely disclosure. However, Metro
15 has not specifically explained how the document production
16 would impede the investigation. To the extent that disclosure
17 might have some detrimental impact on the investigation, that
18 impact is outweighed by the public interest. The public has
19 the right to know the manner in which its government officials
20 are carrying out their public safety responsibilities.

21 Next issue: Personal privacy. Defendant has withheld
22 records on the grounds that they interfere with personal
23 privacy. The Court rejects this argument. The rights to
24 personal privacy can be protected by redactions. Any records

1 subject to production can be redacted by Metro to block the
2 names of individuals other than government officials and also
3 block addresses, phone numbers, social security numbers,
4 descriptions of the individuals, and social media data for all
5 individuals.

6 Defendant also contends that the horrifying 911 calls may
7 be traumatic to close family members who hear the voices of
8 their loved ones facing imminent death or expressing fear and
9 panic if such persons were actually killed. The Court
10 believes that that argument is speculative. Metro has not
11 identified a single instance where a 911 caller was shot. To
12 the extent there is any such interest, Metro can prepare and
13 should have prepared a privilege log for future review, but
14 this Court anticipates that such instances are certainly rare.

15 Metro has requested an in camera review. The Court
16 believes that the time has passed for Defendants to assert any
17 valid objection to production. Moreover, the government has
18 engaged in wholesale withholding of records with insufficient
19 specific reasons to withhold.

20 Conclusion: Defendants have failed to produce by a
21 preponderance of the evidence -- failed to prove by a
22 preponderance of the evidence that any of the requested
23 records are confidential. The strong public interest in
24 disclosure together with the strong presumption in favor of

1 production outweighs any governmental interest. Metro may
2 redact the information regarding individuals as I've already
3 indicated.

4 Finally, during Defendant's process of compiling the
5 records to produce, if Defendant comes across any individually
6 highly confidential record, then the Court will require
7 Defendant to meet and confer with the Plaintiff in an attempt
8 to resolve the issue, but this right to seek a protective
9 order must be used very sparingly. It must not be used to
10 withhold entire groups of documents. The filing of any motion
11 for protective order must not cause any delay in the
12 production of all other requested documents.

13 For those reasons, the Court grants the petition. Now,
14 this Court is inclined to grant the Defendant 30 days to
15 compile and produce the records.

16 Do the parties wish to be heard on the amount of time for
17 the production? Ms. McLetchie, you first.

18 MS. MCLETCHIE: What I would ask is that the records
19 be produced on a rolling basis as they're redacted and
20 reviewed so that delay -- we don't get them all in one lump --
21 production in 30 days, your Honor.

22 THE COURT: What does Respondent have to say about
23 that?

24 MR. CROSBY: I don't necessarily, your Honor, have

1 an objection given the Court's order. Well, I mean, I have
2 objection to the Court's order. But --

3 THE COURT: Of course.

4 MR. CROSBY: -- given the Court's announcement of
5 its order, I don't necessarily have a problem with a rolling
6 disclosure. But I do not foresee my client being able to go
7 through these documents and do the necessary redactions that
8 this Court has ordered inside a 30-day period. We're talking
9 thousands of pages of documents, you know, with respect to
10 like the body worn camera where, you know, hundreds and
11 hundreds and hundreds of hours -- and if someone on that video
12 talking, you know, to an officer gives them personal
13 identifying information which this Court just ordered its
14 redaction, my client needs to be able to redact that or, you
15 know, bleep that out from the video.

16 THE COURT: I understand. I offered 30 days as an
17 initial starting point.

18 MR. CROSBY: Here's what I would propose,
19 your Honor --

20 THE COURT: Yes.

21 MR. CROSBY: -- if -- if Counsel agrees with this is
22 obviously my client can get started on certain things that are
23 not as laborious with respect to the Court's disclosure. But
24 perhaps I can have an opportunity to consult with my client to

1 get a more well-informed idea of how long --

2 THE COURT: Right.

3 MR. CROSBY: -- in light of the Court's order this
4 is going to take, and then we can report back to the Court
5 if -- if the time frame needs to be adjusted. But I'm almost
6 going to guarantee 30 days is not sufficient.

7 THE COURT: So let's do this. I'm going to order a
8 rolling disclosure. I'm also ordering a status conference in
9 30 days. In 30 days I want a report on what has been produced
10 and was not -- what has not been produced. And I'll give the
11 parties an opportunity to explain whether there has been good
12 faith communication regarding the productions, and I'll also
13 entertain at that point in time any objections with respect to
14 either the delay in reporting or the need for more time.

15 MS. MCLEITCHIE: Your -- your Honor, I appreciate
16 that. I would ask that Metro be specifically directed to
17 produce these as soon as possible. I understand that some of
18 this work can take some time. However, it's our position that
19 they should have done some of this work before. Mr. Crosby
20 with all due respect should have conferred with his client in
21 case the Petitioners prevailed today. How much time would it
22 take to get these records produced? But I think that a status
23 check would certainly help. Perhaps sooner than 30 days,
24 though, your Honor.

1 THE COURT: Well, the -- the timely and -- and
2 expeditious production of the records was certainly implicit
3 in my ruling, but I will emphasize that the Court will direct
4 and does direct Metro to exercise utmost good faith in
5 producing the documents on a timely basis.

6 MS. MCLETHIE: Thank you, your Honor.

7 THE COURT: Anything else?

8 MR. CROSBY: If I may, your Honor, respond. The --

9 THE COURT: Yes.

10 MR. CROSBY: -- suggestion that I didn't inquire
11 with my client is the pragmatics of this -- that I have been
12 in discussion with my client. I'm trying to -- in fact, as of
13 yesterday I was trying to get an idea of the universe of
14 documents that we were talking about because we're three
15 months removed from these initial requests.

16 THE COURT: No. I understand, and -- and -- and
17 I'm -- I'm mindful of the fact that -- that Metro has already
18 undertaken great efforts to ascertain the scope of the
19 documents that exist that might be discoverable pursuant to
20 NRS chapter 239. So the Court has no reason to believe that
21 there has been anything less than utmost good faith to this
22 point in time.

23 MR. CROSBY: Thank you, your Honor.

24 THE COURT: Anything else?

1 MS. MCLEITCHIE: Your Honor, could we get some
2 clarification on what the Court considers identifying
3 information? Because I certainly don't want our collective
4 work together to get these records produced delayed with
5 disputes about the scope of the order.

6 MR. CROSBY: What I have, your Honor, in respect to
7 that would be social security numbers, addresses, phone
8 numbers, descriptions of the individual, social media
9 accounts --

10 THE COURT: Names of the individuals of course.

11 MR. CROSBY: Names of the individuals.

12 THE COURT: But not -- not redactions with respect
13 to the officers that were involved in the incident or involved
14 in the investigation. I believe that that is something that
15 is probably disclosed. When we're talking about redacting the
16 names of individuals, I -- what I mean to say is anybody who
17 was interviewed, anybody who appears on the CCTV videos,
18 anybody who has made a 911 call for which anybody -- you know,
19 anybody that is shown in the body camera footage. All
20 those -- to the extent that any of those documents identify
21 the names of the individuals or the description of the
22 individuals or any other personal information, the Court is
23 ordering that that be redacted.

24 All right. So you have -- if you have video, that might

1 be the more difficult -- difficult thing to redact, but I'm
2 not going to micromanage this. I'll let you guys figure that
3 out.

4 MR. CROSBY: And that's -- that's -- there will be a
5 pragmatic hurdle just generally speaking I can anticipate.

6 THE COURT: No. If it's -- if it's video that
7 doesn't make the identity of the individuals apparent, then I
8 would expect that to be produced. If it's a -- if it's a
9 video of a mass group of individuals from some distance and
10 you can't ascertain the identity of the individuals, I would
11 expect that to be produced.

12 Do you understand?

13 MR. CROSBY: Yes, your Honor.

14 THE COURT: Anything else?

15 MS. MCLEITCHIE: Your Honor, we -- just to be clear,
16 we do take the position that the -- when someone calls 911,
17 that is not -- that -- that is not private.

18 Are the calls themselves to be redacted, or are the --

19 THE COURT: No.

20 MS. MCLEITCHIE: -- the calls to be produced in their
21 entirety and the videos to be produced in their entirety?

22 THE COURT: Yes. They are except 911 calls to the
23 extent the individual on the line identifies himself or
24 herself. That may be redacted.

1 MS. MCLEATCHIE: Thank you. I appreciate that
2 clarification. Sometimes there's issues with getting an
3 order -- getting on the same page about an order, so I really
4 appreciate it.

5 I think the Court also mentioned social media -- social
6 media information, and I wasn't clear on why -- what should be
7 protected with regard to that or why it should be in light of
8 the fact that most social media is publicly accessible.

9 THE COURT: If Metro has obtained information about
10 persons of interest from Facebook or any other social media
11 site, I want to make sure that the names and identities of
12 those individuals is not disclosed when Metro conducts its --
13 its obligation to produce those records to you. All right?

14 So if -- so if they have any Facebook data, for instance,
15 that depicts the investigation or depicts the scene or, you
16 know, somebody might have taken pictures or might have taken
17 video of the scene and might have put it up on some kind of,
18 you know, website, and if that information has been acquired
19 by Metro, they have a duty to produce that information, but
20 they also have a responsibility to redact anything that might
21 give away the identity of the persons that prepared that
22 information.

23 MS. MCLEATCHIE: Could we just -- could we clarify
24 that just to limit that restriction to information that's not

1 other -- otherwise publicly available, your Honor? Because
2 certainly, for example, if I have a picture of myself on my
3 Facebook page and it's publicly available, I don't think I
4 have a privacy interest in that picture. For example,
5 Mr. Crosby can see pictures of my dogs.

6 MR. CROSBY: They are pretty cute, but I think --

7 THE COURT: Mr. Crosby, what do you have to say
8 about that?

9 MR. CROSBY: I think there's a difference,
10 your Honor, with -- with someone's, for example, Facebook
11 profile that may be set to private which includes, you know, a
12 profile picture and their name or at least whatever moniker
13 they use to identify themselves on Facebook. There's a
14 difference between that and linking that person and that name
15 to an interview with a police officer or an investigation
16 that's going on with respect to this case.

17 So perhaps his Honor has a Facebook page and it's under
18 some different name so it's not readily -- readily
19 identifiable as you and not searchable as you. But you come
20 up because of our investigative techniques that we have in
21 access to different processes, and it does come up and
22 identify you now so your -- while it is a -- your profile
23 picture and your name --

24 THE COURT: No. I understand. I'm not going to

1 change my ruling on that.

2 Here's the thing. People have Facebook pages. They have
3 lots of friends on those Facebook pages. However, the
4 universe of individuals to which that information is
5 disseminated or published is fairly narrow. Once you reveal
6 that information -- once Metro reveals that information to you
7 in connection with the ongoing investigation, then the
8 identity of those individuals becomes much more -- much more
9 available to the public.

10 I want to protect the privacy interests of these
11 individuals by restricting their names and faces and
12 descriptions just to -- to their friends and family -- whoever
13 is on their Facebook page. What I don't want to do is
14 disseminate, you know, all this information about people
15 because once the press gets it, it's going to be all over the
16 place.

17 MS. MCLEITCHIE: Understood. I understand that,
18 your Honor. But I would ask is that -- what I would ask is
19 that we be sure that the log reflects what type of information
20 was -- was redacted and why so that we could come to the Court
21 and say, "Hey, look. This is somebody's Facebook page that's
22 entirely public, and so on those grounds we think we're
23 entitled to that -- to this information."

24 So my -- my suggestion is just that after they get us the

1 documents -- I don't want them to wait to do the log to give
2 me any documents. But after they give us the documents that
3 they create a log that explains what was redacted and why.
4 And I think that's consistent with the Gibbons case that says
5 that during litigation typically a log is required,
6 your Honor.

7 THE COURT: Mr. Crosby, anything more on that? Are
8 we really talking about a lot of documents? I mean --

9 MR. CROSBY: Yes.

10 THE COURT: -- how many Facebook pages did Metro --

11 MR. CROSBY: I don't know about --

12 THE COURT: -- review?

13 MR. CROSBY: I don't know about Facebook pages, but
14 the documents are going to be in the thousands.

15 THE COURT: Okay.

16 MR. CROSBY: Body worn camera footage is going to
17 be -- you know, pragmatically, your Honor, I don't know how
18 this works when you look at 289830 which is the statutory
19 definition -- designation of body worn camera or portable
20 event recording devices in the state of Nevada. And it states
21 that if -- this is subsection 2. "Any record made by a
22 portable event recording device pursuant to this section is a
23 public record which may be requested only on a per-incident
24 basis and available for inspection only at the location where

1 the record is held if the record contains confidential
2 information that may not otherwise be redacted."

3 So to the extent we can't redact consistent with this
4 Court's order, that footage can not be copied. It has to be
5 viewed in our department per statute. So when I say we have a
6 30-day window to do this, it's going to be impossible,
7 your Honor.

8 THE COURT: All right. I don't see any problem with
9 that. If you have dash cam footage or body cam footage or
10 CCTV footage --

11 MR. CROSBY: Well, CCTV, your Honor --

12 THE COURT: -- I --

13 MR. CROSBY: Sorry. Not to interrupt you. Well,
14 sorry.

15 THE COURT: No. Go ahead. Oh, what I was going to
16 say is if you have some -- some type of document, whether it's
17 hard copy or electronic, and you find it impossible to redact
18 the individual information so -- so that, you know, members of
19 the public are not revealed or disclosed in those documents,
20 then I will give you the opportunity to either redact it, or
21 if you find that is impossible or too burdensome, then you can
22 simply require that Plaintiff come over to your office to
23 review that document. I think --

24 MS. MCLEITCHIE: Your Honor, I --

1 THE COURT: -- that's certainly appropriate in those
2 instances where it's going to be virtually impossible for
3 redaction.

4 MS. MCLEITCHIE: Your Honor, that's understandable.

5 THE COURT: And if you have a problem with that, if
6 you believe that Metro is unnecessarily withholding
7 production, you can mention that to me in 30 days when we're
8 all back here.

9 MS. MCLEITCHIE: Thank you, your Honor. I'd also
10 point out that under that -- under that statute if we're
11 provided a redacted version they still have rights to go view
12 that on an incident-by-incident basis at the Metro offices.

13 THE COURT: They produce it. I'm not making any
14 order now that you still can't go look at the records at their
15 offices.

16 MS. MCLEITCHIE: Thank you, your Honor.

17 MR. CROSBY: And just NRS 239.052 subsection 4
18 permits a fee for a government entity to charge. This is --
19 there's that section. There's also a secondary section that
20 provides for extraordinary efforts to produce records. I
21 don't -- I don't think anyone is going to refute that this is
22 going to require extraordinary effort to comply and --

23 THE COURT: They have to pay to the same extent they
24 would have had to pay in accordance with NRS chapter 239. I'm

1 not waiving the payment obligation.

2 MR. CROSBY: Thank you, your Honor.

3 MS. MCLEITCHIE: Your Honor, this is the first time
4 that they've asserted that there would be any payment
5 obligation.

6 THE COURT: But it's in the statute. It's clear.

7 MS. MCLEITCHIE: I understand, but there's actually
8 some disagreement if -- as you might imagine between the media
9 and Metro about what are charges. And in other instances,
10 district courts have held that time, for example, expended in
11 redacting documents cannot be charged to requesters of
12 documents. That was in a case I litigated some years ago in
13 front of Judge Susan Johnson.

14 THE COURT: Isn't it just a -- a per-page charge?

15 MR. CROSBY: Well, your Honor --

16 THE COURT: Are you planning on --

17 MR. CROSBY: -- this is where Miss --

18 THE COURT: -- billing --

19 MR. CROSBY: This is where Ms. McLetchie and I have
20 a disagreement because we were actually in discussions
21 regarding another unrelated matter. But -- so 2 -- 239.052
22 subsection 4 --

23 THE COURT: 05?

24 MR. CROSBY: 052 subsection 4.

1 THE COURT: Give me one moment to get there.
2 All right. "The fee for providing a copy of a public book or
3 record in the custody of a law library operated by a
4 governmental entity" --

5 MR. CROSBY: Sorry.

6 THE COURT: That doesn't sound like the right --

7 MR. CROSBY: That's not -- I gave you the wrong -- I
8 gave you the wrong citation.

9 THE COURT: Okay.

10 MR. CROSBY: Your Honor, it's -- if you go up to --
11 it's subsection 1. "Except as provided in subsection, a
12 governmental entity may charge a fee for providing a copy of a
13 public record. Such a fee must not exceed the actual cost of
14 the governmental entity to provide the copy of the public
15 record unless a specific statute or regulation sets a fee that
16 the governmental entity must charge for that copy -- copy. A
17 governmental entity shall not charge a fee for providing a
18 copy of a public record if a specific statute or regulation
19 requires a governmental entity to provide the copy without a
20 charge."

21 So we don't have that in this case, and this is where
22 Ms. McLetchie and I have a disagreement with respect to what
23 is permitted under the statute given its vagueness. The
24 department has a fee schedule that's made public that sets

1 forth an hour rate of charge that the department charges when
2 its personnel has to go above and beyond and not just simple
3 redaction. But if we have to review something, for example,
4 to determine whether or not it -- it is -- a person's name is
5 subject to like a rape shield protection for their identity or
6 if a reference is pertaining to an active criminal
7 investigation that can't be disclosed -- so it's a content
8 review.

9 THE COURT: Right. So the statute is ambiguous.
10 What I certainly don't want to see is Metro effectively
11 impeding public access to records by charging an exorbitant
12 fee.

13 MR. CROSBY: Certainly not. And we've had these --
14 we've had these fees for a number of years, and the -- I
15 believe the Secretary of State has a similar fee structure and
16 some other --

17 THE COURT: Just because you've done it doesn't mean
18 it's right.

19 MR. CROSBY: No. But what I'm saying is that's
20 certainly not the intent and nor has it ever been the intent
21 of the department, but at some point there has to be
22 recognition that this is taking away from government --
23 government employees' ability to go do their actually assigned
24 job or primary function --

1 THE COURT: Tell you what. I'm going to give you
2 both an opportunity to brief this issue if you still hotly
3 contest it.

4 MS. MCLEATCHIE: Your Honor, I think that perhaps we
5 could submit briefs within a week so that this issue can be
6 resolved and not delay production of the records.

7 THE COURT: All right. Why don't you both provide
8 me with briefs?

9 MS. MCLEATCHIE: Thank you --

10 THE COURT: Produce them to each other. Get them to
11 me within a week. My court clerk will provide you the date.
12 I will review them and then issue a minute order with respect
13 to the appropriate charge that Metro may charge in this case.
14 All right?

15 MR. CROSBY: Thank you, your Honor.

16 MS. MCLEATCHIE: Thank you, your Honor.

17 THE COURT: What's the week date?

18 THE CLERK: February 14th.

19 THE COURT: February 14th. All right?

20 MS. MCLEATCHIE: Thank you, your Honor.

21 THE COURT: Anything else?

22 MS. MCLEATCHIE: No.

23 MR. CROSBY: No, your Honor.

24 MS. MCLEATCHIE: Thank you very much, your Honor.

1 THE COURT: All right. Thank you.

2 [DISCUSSION OFF THE RECORD]

3 THE COURT: Oh, right. Sorry. We'll have a 30-day
4 status check. She's going to give you that date as well.

5 MS. MCLETCHIE: Okay. Thank you.

6 THE CLERK: It will be March 7th at 9:00 a.m.

7 MS. MCLETCHIE: March 7th?

8 THE COURT: All right. Thank you.

9 MR. CROSBY: Your Honor, will there be a written
10 order produced in this case? I think there's a requirement
11 that there be a written order.

12 MS. MCLETCHIE: Oh.

13 THE COURT: I will ask the Petitioners to prepare
14 that. All right? Make sure that you run it by Metro, Metro's
15 counsel before you submit it to me. I'm not going to require
16 that Metro counter-sign, but I want you to provide the order
17 to me, and I will look it over. But I want you to provide a
18 copy to Metro at least two full business days before you
19 provide it to me because what I want to do is I want to give
20 Metro an opportunity to prepare a counter-order if you believe
21 anything in the order that Ms. McLetchie prepares is blatantly
22 or materially inconsistent from my ruling on the bench.

23 MR. CROSBY: Thank you, your Honor.

24 THE COURT: All right?

1 MS. MCLEATCHIE: Thank you, your Honor.

2 [HEARING CONCLUDED AT 10:22 A.M.]

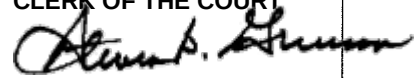
3 *****

4
5 ATTEST: I do hereby certify that I have truly and
6 correctly transcribed the audio-video recording of this
7 proceeding in the above-entitled case.

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11 

12 _____
13 Matthew Kennedy, CSR No. 13822
14 Certified Shorthand Reporter
15 For The State Of California
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EXHIBIT F



Marquis Aurbach Coffing

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Attorneys for Respondent Las Vegas
Metropolitan Police Department

DISTRICT COURT

CLARK COUNTY, NEVADA

American Broadcasting Companies, Inc.; The
Associated Press; Cable News Network, Inc.;
Chesapeake Media I, LLC, d/b/a KSNV-TV; Los
Angeles Times Communications, LLC; The New
York Times Company; Scripps Broadcasting
Holdings LLC d/b/a KTNV-TV; and WP
Company LLC d/b/a The Washington Post,

Petitioners,

vs.

Las Vegas Metropolitan Police Department,

Respondent.

Case No.: A-17-764030-W

A-17-764169-W

Dept. No.: 2

[ORAL ARGUMENT REQUESTED]

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S MOTION FOR
RECONSIDERATION AND STAY PENDING RECONSIDERATION¹**

Las Vegas Metropolitan Police Department (the "Department" or "LVMPD"), by and
through its attorney of record, Marquis Aurbach Coffing, hereby files its Motion for
Reconsideration and Stay Pending Reconsideration.

...

¹ LVMPD had not agreed to waive disqualification in accordance with Judge Scotti's minute order entered on March 12, 2018. As such, it is LVMPD's understand Judge Scotti will enter an order of disqualification on March 19, 2018. Once the matter is reassigned to a new department, LVMPD will request that this motion be heard on order shortening time.

1 This Motion is made and based upon the papers and pleadings on file herein, the
2 Memorandum of Points and Authorities, and any oral argument allowed by the Court at a hearing
3 on this matter.

4 Dated this 16th day of March, 2018.

5 MARQUIS AURBACH COFFING

6 By: /s/ Jackie V. Nichols
7 Craig R. Anderson, Esq.
8 Nevada Bar No. 6882
9 Nick D. Crosby, Esq.
10 Nevada Bar No. 8996
11 Jackie V. Nichols, Esq.
12 Nevada Bar No. 14246
13 10001 Park Run Drive
14 Las Vegas, Nevada 89145
15 Attorneys for Respondent Las Vegas
16 Metropolitan Police Department

17 **NOTICE OF MOTION**

18 You and each of you, will please take notice that the **LAS VEGAS METROPOLITAN**
19 **POLICE DEPARTMENT'S MOTION FOR RECONSIDERATION AND STAY**
20 **PENDING RECONSIDERATION** will come on regularly for hearing on the **23rd** day of
21 **April**, 2018, at the hour of **In Chambers** _____m., or as soon thereafter as counsel
22 may be heard, in Department 2 in the above-referenced court.

23 Dated this 16th day of March, 2018.

24 MARQUIS AURBACH COFFING

25 By: /s/ Jackie V. Nichols
26 Craig R. Anderson, Esq.
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Metropolitan Police Department

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 LVMPD requests the Court reconsider its March 2nd Order requiring disclosure of
4 various public records. The March 2nd Order was clearly erroneous because the government's
5 interest in non-disclosure significantly outweighs any interest the public has in access.
6 Furthermore, the Court's Order failed to address several key issues, including dismissal of
7 certain Petitioners for failing to make a public records request and dismissal of certain requests
8 directed towards disclosure of evidence and not public records. Likewise, the Court overlooked
9 LVMPD's argument that vague and ambiguous requests, such "as any records related to 1
10 October" are not sufficient requests and should not be considered.

11 In the event the Court maintains its position that the public records must be disclosed, the
12 Court's March 9th Order is still erroneous. First, NRS 239.055 applies to public records in both
13 hard copy and electronic data format. As such, LVMPD may charge for pre-preparation costs
14 associated with production of all requested documents, including 911 calls and BWC. Pre-
15 preparation costs include staff time costs associated with analyzing, redacting and reviewing the
16 requested information prior to disclosure. Finally, the March 9th Order timeline requirement for
17 production of the documents and compliance with the Order is not only unreasonable, but
18 entirely impossible.

19 Given the Court's orders to begin production of documents in such a short time period,
20 LVMPD also requests that the Court stay the instant proceedings until a decision is entered on
21 LVMPD's Motion for reconsideration.

22 **II. STATEMENT OF FACTS**

23 **A. PROCEDURAL HISTORY.**

24 On November 2, 2018, Petitioners American Broadcasting Companies, Inc. ("ABC"), the
25 Associated Press ("AP"), Cable News Network, Inc. ("CNN"), Chesapeake Media I, LLC, d/b/a
26 KSNV-TV ("KSNV"), Los Angeles Times Communications, LLC ("LA Times"), The New
27 York Times Company ("NYT"), and WP Company LLC d/b/a The Washington Post's
28 ("Washington Post") (collectively "Coalition") filed their Public Records Act Application

1 Pursuant to Nev. Rev. Stat. 239.011/Petition for Writ of Mandamus. The following day, the Las
2 Vegas Review Journal ("LVRJ") (collectively with the Coalition the "Petitioners") filed its
3 Public Records Act Application Pursuant to Nev. Rev. Stat. 239.011/Petition for Writ of
4 Mandamus. Shortly thereafter, LVRJ moved to consolidate the matters. Prior to consolidation,
5 LVMPD was served with the Coalition's Petition and submitted a peremptory challenge. The
6 matter was transferred from Department 24 to Department 2, before the Honorable Judge Scotti.

7 On November 28, 2017, LVRJ amended its Petition. Likewise, on December 6, 2017, the
8 Coalition amended its Petition to include Scripps Broadcasting Holdings, LLC d/b/a KTNV-NV
9 ("KTNV") (collectively included with the Coalition and Petitioners). On December 11, 2017,
10 the parties entered into a stipulation and order regarding the briefing schedule and February 7,
11 2018 hearing.

12 **B. MARCH 2, 2018 ORDER.**

13 On February 7, 2018 the Court entertained oral arguments on the briefing previously
14 submitted regarding Petitioners' Amended Petitions requesting various documents from LVMPD
15 related to the 1 October Massacre. The Court determined LVMPD failed to meet its burden in
16 demonstrating that the impact on the current investigation outweighs the public's interest in
17 disclosure. *See* Order filed March 2, 2018 on file herein (the "March 2nd Order"). Furthermore,
18 the Court concluded that any personal privacy concerns implicated by disclosure can be
19 remedied through redaction. *Id.* Summarily, the Court ordered the disclosure of: 911 calls; body
20 camera data; dash cam data; CCTV videos; evidence logs; dispatch information; interview
21 reports; search warrant returns; affidavits of probable cause; purchase orders and no-bid
22 contracts; and any information on any weapons obtained during the investigation into the 1
23 October Massacre. *Id.*

24 Notably, the Court also decided it would not waive any fee obligations pursuant to the
25 NPRA. At the hearing, however, the Parties disagreed about the costs LVMPD was entitled to
26 charge in accordance with the NPRA. As a result, the Court ordered briefing on the fee issue,
27 which the Parties submitted on February 14, 2018. The Court's Order did not address LVMPD's
28

arguments concerning Petitioner Washington Post's standing or evidence being requested as a public record.

C. MARCH 9, 2018 ORDER.

A status check regarding the production of the documents was set for March 7, 2018. The Court heard additional arguments regarding the fee issues previously briefed. In particular, there remained two underlying issues: (1) whether the production of the information required the extraordinary use of personnel or technological resources; and (2) if so, what could LVMPD charge for the extraordinary use of its personnel or technological resources. Petitioners contended LVMPD's production did not require extraordinary use of personnel. *See* Petitioners' Supplemental Brief filed on February 14, 2018 on file herein. And, if it did, LVMPD was limited to charging \$0.50 per page and not permitted to charge for staff time in preparing, reviewing, redacting, or performing quality control of the disclosures. *Id.* On the other side, LVMPD argued that due to the sheer volume of information, extraordinary use of personnel was necessary. *See* LVMPD's Brief Regarding Fees Permitted to be Charged Pursuant to NPRA filed on February 14, 2018 on file herein ("LVMPD's Fee Brief"). Furthermore, LVMPD contended the extraordinary use of personnel statute would be rendered superfluous if it was not permitted to charge for staff time. The Court took the matter under advisement and issued its order on March 9, 2018. *See* Order filed on March 9, 2018 on file herein (the "March 9th Order"). The March 9th Order made the following determinations:

- NRS 239.055 only applies to hard copies of documents and pages of documents that are stored electronically and not to electronic data.
- Extraordinary use of personnel applies only to the interview reports and evidence logs. LVMPD may charge its \$0.31 per page copy cost, in addition to a \$0.50 per page fee, for a total of \$0.81 fee per page.
- Body cam footage and 911 calls are electronic data not subject to NRS 239.055, and therefore NRS 239.052 is applicable. LVMPD may not charge pre-copy preparations, including staff time, for preparing this information for disclosure. LVMPD may only charge the actual cost for copying the data and the cost of the medium used.
- Dispatch logs are subject to NRS 239.054, which allows LVMPD to charge for pre-preparation costs.

- LVMPD has a minimum period of six months to produce all of the requested information.
- LVMPD must begin production of records to Petitioners within three business days from the date of the Order.
- LVMPD must provide Petitioners with an estimate of the associated costs consistent with the Order within three business days from the date of the Order.
- Petitioners may pay the associated costs in six monthly installments and must pay each month at least one sixth of the anticipated total charge at the beginning of each month.

Id.

D. THE PUBLIC RECORDS REQUESTS.

For brevity, below is a chart outlining the various requests at issue.

<u>Media Agency</u>	<u>Date</u>	<u>Request</u>
ABC	10/2/2017	"All body cam, dash cam, CCTV video (publicly and privately owned), as well as any other types of recording connected with the active shooter/mass casualty event on Oct. 1, 2017. Also . . . all police radio traffic and all police reports connected with the incident." ²
ABC	10/11/2017	"All 911 audio connected with Oct. 1 shooting incident at Mandalay Bay." ³
CNN	10/3/2017	"[A]ll copies of records pertaining to Stephen Paddock . . . specifically including but not limited to 911 dispatch calls, evidence logs, hotel surveillance video, police body cam footage, interview reports, and anything related to this investigation." ⁴
LA Times	10/10/2017	"the 911 recordings related to the shooting . . ." ⁵
AP	10/12/2017	"[A]ny and all 911 emergency calls dispatch recordings relating to the shooting . . ." ⁶
AP	10/24/2017	Form request for Body Worn Camera ("BWC") ⁷
NYT	10/16/2017	"[C]opies of public records that include information about emergency response to the mass shooting . . . [t]his includes all

² See Coalition's Amended Petition at Exhibit 1.

³ *Id.* at Exhibit 2.

⁴ *Id.* at Exhibit 3.

⁵ *Id.* at Exhibit 4.

⁶ *Id.* at Exhibit 5.

⁷ *Id.* at Exhibit 6.

		records of phone calls to police, recordings of dispatch and body camera footage.” ⁸
KTNV	11/13/2017	Access to all copies of records pertaining to Stephen Paddock, the suspect in the Las Vegas Shooting, specifically including but not limited to 911 dispatch calls, evidence logs, hotel surveillance video, police body cam footage, interview reports, and anything related to this shooting investigation. All applications for search warrants related to the shooting. ⁹
LVRJ	10/2/2017	Log and call slips of emergency calls made on October 1, 2017 between 8:00 p.m. and 2:00 p.m., including unit logs for police and fire and ambulance dispatch. ¹⁰
LVRJ	10/15/2017	Purchase orders for emergency purchases on or after Oct. 1, 2017 and emergency no-bid contracts on or after Oct. 1, 2017. ¹¹
LVRJ	11/30/2017	Copies of any and all documents that reflect any weapons obtained through the course of the . . . investigation that are suspected to have belonged to mass shooter Stephen Paddock. ¹²

E. LVMPD’S SIGNIFICANT BURDEN.

Despite Petitioners’ various and vague requests, the March 2nd Order specifically enumerated the documents to be produced, which includes:

- 911 calls;
- Body Worn Camera (“BWC”) footage;
- Dash cam;¹³
- CCTV Videos;
- Evidence Logs;
- Dispatch Information;
- Interview Reports;
- Search Warrant Returns;
- Affidavits of Probable Cause;
- Purchase Orders and No-Bid Contracts; and
- Information on any weapons obtained during the investigation into the October 1 Massacre.

See March 2nd Order at ¶ 27. With respect to the 911 calls, without actually reviewing all 911 calls, LVMPD estimates it received upwards of 1,500 calls in the first 4 hours regarding the 1

⁸ *Id.* at Exhibit 7.

⁹ See KTNV request dated November 6 2017, attached hereto as **Exhibit A**.

¹⁰ See LVRJ’s Amended Petition at Exhibit 1.

¹¹ *Id.* at Exhibit 6.

¹² *Id.* at Exhibit 7.

¹³ LVMPD does not use Dash Cams for its vehicles.

1 October shooting and approximately 2,000 total calls related to the incident in general. In
2 accordance with the Court's ruling, LVMPD must redact any personal identifying information
3 from these phone calls. Today, LVMPD employs three research analysts who are qualified and
4 trained to perform redactions of 911 calls. Moreover, LVMPD only maintains one software
5 license for redacting 911 calls, and therefore, it is uncertain whether more than one person at a
6 time is able to perform the redactions.

7 Lieutenant Corey Moon has indicated there is approximately 748 hours of BWC footage
8 related to the 1 October shooting. *See* Declaration of Lt. C. Moon, attached hereto as **Exhibit B**.
9 The redaction process for BWC footage is quite time consuming, as it requires: (1) an initial
10 review of the footage to determine what content needs to be redacted; (2) redacting the
11 information, both video and audio, at frame level editing; and (3) quality control review by an
12 uninvolved operator to ensure redaction is completed. *Id.* LVMPD only employs two officers
13 that are specifically trained and assigned to redact BWC footage. Both of the officers have
14 special high performance computers and dedicated redaction software used to redact videos. *Id.*
15 The follow chart is an estimate of the time and cost associated with producing the BWC footage:

	<u>Hours of Video</u>	<u>Rate</u>	<u>Time Spent</u>	<u>Total Cost</u>
Initial Review	748	1.25 hours	935 hours	\$46,750
Redaction Process	748	4 hours	2992 hours	\$149,600 (low)
	748	10 hours	7480 hours	\$347,000 (high)
Quality Control	748	1 hour	748 hours	\$37,400

21
22 Lieutenant Moon estimates if the project is properly staffed, it could take anywhere from six
23 months or longer to complete. *Id.*

24 To shed some light on these figures, it is important to know that it took LVMPD,
25 specifically two squads of people from the Critical Incident Review Team (CIRT), 60 days to
26 review all this footage just for investigatory purposes. *Id.* Given the amount of video hours, and
27 an entirely different purpose, it would take *at least* 23 weeks for one employee to complete the
28 initial review process, which would require the employee to review this footage on a continuing

1 basis. *Id.* Surely, it is understandable that LVMPD owes a duty to its employees to be mindful
2 of their mental health. This material is extremely graphic and it is against LVMPD policy to
3 assign a single person to review this material. With that said, LVMPD can only require the
4 trained employees to review the materials a few hours per day due to potential issues involved
5 with reviewing the graphic material.

6 While LVMPD cannot say for certain the number of "interview reports"¹⁴ it has, it
7 estimates upwards 1,500 documents generally related to 1 October. As of now, LVMPD has not
8 been able to ascertain a total page number for these documents. Importantly, these documents
9 will likely contain personal information that will require redaction. Like much of the other
10 information requested, this will require employees to review and redact personal, identifiable
11 information, requiring significant use of personnel.

12 The significant amount of data related to these requests is quite telling. LVMPD is not
13 able to review and redact this information on its network server because of the volume of data,
14 which is estimated to be tens of terabytes. *See* Declaration of Kevin Skehan, attached hereto as
15 **Exhibit C**. In order to be able to begin production of the documents, LVMPD must first transfer
16 all of the information to a separate server off the network. *Id.* Ultimately, this information will
17 need to then be transferred to a separate server for Petitioners' review.

18 It is more than apparent that this is not a typical records request where the governmental
19 agency can just copy documents in a matter of minutes. Extraordinary effort by LVMPD
20 personnel will be required to ultimately complete these disclosures. Pursuant to NRS 239.052
21 and NRS 239.055, LVMPD maintains a Fee Schedule outlining the costs associated with
22 reproduction of certain documents, including when extraordinary use of personnel is required.
23 *See* LVMPD's fee schedule, attached hereto as **Exhibit D**. Notably, LVMPD charges \$0.31 for
24 copying documents, which is in compliance with NRS 239.055. *Id.*

25 Recently, the parties held a meet and confer regarding the disclosure of public records as
26 a result of the Court's March 9th Order. *See* Letter to Counsel dated March 14, 2018, attached

27 ¹⁴ LVMPD is uncertain of what "interview reports" entails and has since asked Petitioners for
28 clarification.

1 hereto as **Exhibit E**. LVMPD informed Petitioners that it was not in possession of dash cams or
2 evidence logs. *Id.* During the conference, the parties also agreed that the documents related to
3 the search warrant returns and affidavits of probable cause did not need to be reproduced. *Id.* As
4 such, these records are no longer at issue.

5 **III. LEGAL ARGUMENT**

6 **A. STANDARD FOR RECONSIDERATION OF COURT'S PREVIOUS** 7 **ORDER.**

8 Reconsideration of court orders is authorized by local rule Eighth Judicial District Court
9 Rule 2.24(b) and appropriate when "substantially different evidence is subsequently introduced
10 or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley,*
11 *Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). In addition, this Court has
12 the inherent authority to amend, correct, reconsider or rescind any of its prior orders. *Trail v.*
13 *Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975); accord, *Goodman v. Platinum Condo.*
14 *Dev., LLC*, 2012 WL 1190827, *1 (D. Nev. Apr. 10, 2012) ("the court has inherent jurisdiction
15 to modify, alter or revoke [a non-appealable order]"); *Sussex v. Turnberry/MGM Grand Towers,*
16 *LLC*, 2011 WL 4346346, at *2 (D. Nev. Sept. 15, 2011) (court has "inherent procedural power to
17 reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient").
18 Finally, this Court has discretion on the question of reconsideration. *See Harvey's Wagon*
19 *Wheel, Inc. v. MacSween*, 96 Nev. 215, 217-18, 606 P.2d 1095, 1097 (1980) (reconsideration of
20 previously denied motion for summary judgment approved as the "judge was more familiar with
21 the case by the time the second motion was heard, and he was persuaded by the rationale of the
22 newly cited authority"). For the reasons described below, the Court's previous orders were
23 clearly erroneous.

24 **B. THE MARCH 2, 2018 ORDER.**

25 In sum, this Court's March 2nd Order required LVMPD to produce the requested "public
26 records." LVMPD, however, made several arguments that the Court did not rule on and are
27 significant to this matter. First, the Court never addressed the Petitioner Washington Post's
28 standing. Similarly, LVMPD argued at the hearing that evidence, including private CCTV video

1 and hotel surveillance video, does not transform property into a public record. The Court
2 granted Petitioners' requests as to CCTV video but did not clarify whether that included private
3 and hotel surveillance video. Many of Petitioners' submissions contained "catchall" requests,
4 such as any and all public records related to the 1 October incident. LVMPD also contends that
5 because the requests lacked specificity such requests should not be considered. The catchall
6 requests lacking specificity were also overlooked by the Court. Finally, LVMPD maintains that
7 the governmental interest in non-disclosure significantly outweighs the public's interest in
8 access.

9 **1. Petitioners Washington Post and KSNV have No Standing.**

10 The NPRA permits a requester to seek court intervention after a public record request has
11 been denied. *See* NRS 239.011. Thus, prior to seeking court intervention, a petitioner must have
12 made a request to the governmental entity for a public record. *Id.* LVMPD did raise this issue in
13 its initial opposition and at the hearing; however, the Court never addressed whether or not
14 Petitioner Washington Post did, in fact, have standing. Furthermore, Petitioners failed to provide
15 any evidence, or even address the issue, in its reply brief. After closer review, KSNV also failed
16 to make any public records requests to LVMPD, and therefore, lack standing to assert its rights
17 to the same. For these reasons, LVMPD requests that this Court dismiss Petitioners Washington
18 Post and KSNV for lack of standing.

19 **2. Evidence is not a Public Record.**

20 Petitioners made requests for CCTV Videos, publicly and privately owned, as well as
21 hotel surveillance video related to the 1 October Massacre. The NPRA explicitly permits access
22 to "public records" of a governmental entity. *See* NRS 239.010. Notably, "public record" is not
23 defined within the NPRA. The Nevada Administrative Code, however, defines a "record of a
24 local governmental entity" as:

25 ***[I]nformation*** that is created or received pursuant to a law or ordinance, or in
26 connection with the transaction of the official business of any office or
27 department of a local governmental entity, including, without limitation, all
28 documents, papers, letters, bound ledger volumes, maps, charts, blueprints,
drawings, photographs, films, newspapers received pursuant to NRS 247.070,
recorded media, financial statements, statistical tabulations and other

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documentary materials or information, regardless of physical form or characteristic.

NAC 239.101. The latest revision of this definition took place in 2014 and no Nevada courts have since interpreted this meaning. In looking to the plain meaning of the terms used to define a “record,” it is clear that evidence obtained through a police investigation is not subject to the scope of the NPRA. The term “information” is significant in concluding that such evidence is not a public record. Merriam-Webster’s Dictionary defines “information” as: communication or reception of knowledge or intelligence; facts, data.¹⁵ To illustrate, firearms and contraband recovered as a result of a police investigation is not “information.” More often than not, such tangible items are seen as property. While LVMPD may possess the property until the conclusion of the investigation, possession of the property does not render it a public record. In other words, the public would not be able to obtain “copies” of the firearm or contraband under the NPRA. The same logic applies to the privately owned CCTV videos and hotel surveillance videos. This property does not belong to LVMPD nor is it a record of LVMPD. Instead, information created or received as part of an investigation would be voluntary statements of witnesses which contain facts and information. As such, any private CCTV videos and hotel surveillance video is not subject to the NPRA.

3. Requests Must be Made with Specificity.

When denying a public records request, the NPRA requires a governmental entity to cite to the specific statute or other legal authority that renders the specific public record confidential. NRS 239.0107(d)(2). Petitioners also contend that, at a minimum, LVMPD should have provided the requested records in redacted form in accordance with NRS 239.010(3). Understandably, a governmental entity cannot adequately respond to a blanket public records request. Rather, a requester must “present a reasonably focused and specific request, so that the [governmental entity] will have an opportunity to promptly identify and locate such record and to determine whether any exemption to disclosure applies.” *Galbiso v. Orosi Pub. Util. Dist.*, 167

¹⁵ See Merriam-Webster Dictionary, Information, <https://www.merriam-webster.com/dictionary/information?src=search-dict-box>, last accessed March 13, 2018, last updated March 6, 2018.

1 Cal.App.4th 1063, 1088, 84 Cal.Rptr.3d 788 (2008). Here, many of Petitioners' requests contain
2 catchall provision to include every public record LVMPD has in its possession related to the 1
3 October Massacre.

4 Without identifying specific public records, it is impossible for LVMPD to appropriately
5 respond in accordance with the NPRA. While the NPRA does not particularly provide
6 requirements for a request, a request must, at least, be sufficiently detailed with information to
7 allow the governmental entity to locate and identify the public records. This logic is supported
8 by the other statutory requirements throughout the NPRA, including NRS 239.0107(d) and NRS
9 239.010(3). For example, it is impossible for LVMPD to redact confidential information without
10 knowing what specific public records to produce.

11 More importantly, this was the Nation's deadliest mass shooting and one of if not the
12 largest FBI investigations to date. Although in certain instances a request for public records
13 related to an isolated incident may be deemed sufficient, the amount of manpower and resources
14 utilized in response to this event is overwhelming. The volume of documents and hours of video
15 footage corroborate the extensive investigation performed by LVMPD and FBI. In no way
16 would any governmental entity be able to sufficiently respond to a blanket public records request
17 seeking "all public records" related to such a significant event. Therefore, LVMPD requests that
18 any catchall provisions contained in Petitioners' requests be stricken and not considered in
19 conjunction with their Petitions.

20 **4. The Balancing of Interests Weigh in Favor of Non-Disclosure.**

21 The NPRA requires LVMPD to demonstrate that the requested information is
22 confidential. NRS 239.0113. In the absence of a statutory provision that explicitly declares a
23 record to be confidential, any limitations on disclosure must be based upon a broad balancing of
24 interests involved. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628
25 (2011) (citations omitted). In other words, prior to ordering disclosure, the Court must apply a
26 balancing test to determine whether the government's interest in non-disclosure significantly
27 outweighs the public's interest in access. *Id.* Public policy considerations weighing in favor of
28 non-disclosure include pending or anticipated criminal proceedings; protection of investigative

1 techniques; possibility of denying someone a fair trial; and jeopardy to law enforcement
2 personnel. *See Donrey of Nevada, Inc. v. Bradshaw*, 102 Nev. 630, 636, 798 P.2d 144

3 In balancing the interests of the parties, two of the *Bradshaw* public policy considerations
4 weighing in favor of non-disclosure apply to the instant public records requests—protection of
5 investigative techniques and jeopardy to law enforcement personnel—which, in totality,
6 significantly outweigh the public’s interest in access. Disclosure of all the requested
7 information, in its totality, is a significant danger to LVMPD personnel, risks disclosure of
8 investigative techniques employed by the responding officers, and threatens public safety. *See*
9 **Exhibit C**. Today’s computer science technology platforms are designed to ingest and process
10 all formats of electronic data, down to granularity. These platforms include NICE Investigate,
11 Motorola Command Central, Veritone and AXON. Essentially, the computer system performs
12 its own comprehensive analysis, creating a blueprint of the attack and police response. In fact,
13 NYT has already begun to create a blueprint with the videos and information currently available
14 to the public. *See* NYT Investigates: Mapping the Las Vegas Massacre, attached hereto as
15 **Exhibit F**. Disclosure of *all* records requested would effectively reverse engineer the entire
16 attack and response in real time. In other words, an individual would be able to simultaneously
17 listen to 911 calls while watching BWC and responses of officers, as illustrated in NYT’s current
18 limited video. This information, coupled with witness statements, other reports, and CCTV
19 videos, will give the public exact details of how the event was planned and executed, as well as
20 the sensitive tactical response by law enforcement. Thus, disclosure of the records would
21 undoubtedly reveal investigative techniques utilized by responding officers. Informing the
22 public of the investigative techniques places LVMPD officers in a dangerous predicament in any
23 future attacks as their responsive techniques would be readily available to the public. Finally,
24 and more importantly, the public safety in disclosing all requested documents is significantly at
25 risk as the blueprint could very well serve as a basis for another attack. These public policy
26 considerations in favor of non-disclosure significantly outweigh the public’s interest in access.
27
28

1 **C. THE MARCH 9, 2018 ORDER.**

2 If the Court finds that the public's interest in disclosure significantly outweighs
3 LVMPD's interest in non-disclosure, LVMPD requests this Court to reconsider the March 9th
4 Order regarding fees LVMPD is permitted to charge for such production. The March 9th Order
5 is clearly erroneous for the reasons identified below.

6 **1. LVMPD is Permitted to Charge for Personnel Time.**

7 The NPRA clearly carves out an exception to charge additional fees when the
8 governmental agency requires extraordinary use of personnel in responding to a request. NRS
9 239.055. The more difficult question to discern, however, is whether a governmental entity may
10 charge for personnel time utilized in responding to requests that require extraordinary use of
11 personnel. Specifically, NRS 239.055 provides:

12 Except as otherwise provided in NRS 239.054 regarding information provided
13 from a geographic information system, *if a request for a copy of a public record*
14 *would require a governmental entity to make extraordinary use of its personnel or*
15 *technological resources, the governmental entity may, in addition to any other*
16 *fee authorized pursuant to this chapter, charge a fee not to exceed 50 cents per*
17 *page for such extraordinary use. Such a request must be made in writing, and*
18 *upon receiving such a request, the governmental entity shall inform the requester,*
19 *in writing, of the amount of the fee before preparing the requested information.*
20 *The fee charged by the governmental entity must be reasonable and must be*
21 *based on the cost that the governmental entity actually incurs for the*
22 *extraordinary use of its personnel or technological resources.*

23 There is no doubt that this statute applies to this instant case. The amount of data involved in
24 this case requires LVMPD to not only transfer this information to an entirely separate drive off
25 of the network, but it must also pull its staff from day-to-day functions to analyze, redact, and
26 review tens of Terabytes of information. As LVMPD suggests below, the production of this
27 information alone will take, at minimum, a year to disclose. Thus, responding to Petitioners'
28 requests will require extraordinary use of LVMPD's personnel.

 It is LVMPD's position that the \$0.50 per page limitation only applies to coping charges
and LVMPD may charge a requester for staff time when it involves the extraordinary use of
personnel, so long as that cost is reasonable and LVMPD actually incurs that cost. This
interpretation of the plain language of the statute is reasonable given the "per page" language
following the \$0.50 limitation. If a governmental entity was prohibited from charging any fees

1 exceeding \$0.50, including staff time, the later sentence clarifying that the “cost must be
2 reasonable” and “actually incur[red]” would be meaningless. Furthermore, if the statute was
3 intended to limit a governmental entity for charging a fee of not more than \$0.50, the statute
4 would not have included the “per page” language. Instead, it would read “the governmental
5 entity may . . . charge a fee not to exceed 50 cents for such extraordinary use.” At a minimum,
6 there is an internal conflict with statute itself, which causes ambiguity. *See Orion Portfolio*
7 *Services 2, LLC v. County of Clark, ex rel. Univ. Medical Cntr. of S. Nev.*, 126 Nev. 397, 402,
8 245 P.3d 527, 531 (2010) (determining that an internal conflict also creates ambiguity).

9 Without reciting the legislative history detailed in LVMPD’s Fee Brief, the three most
10 instructive documents are: (1) the Attorney General Opinion issued in 2000; (2) the Attorney
11 General Opinion issued in 2002; and (3) the Committee Minutes of the last hearing held
12 regarding Senate Bill 74 on May 3, 2013. If this Court has any doubt as to whether the statute is
13 ambiguous, or even permits a governmental agency to charge for personnel time, the Court
14 should look to the Attorney General opinions for guidance.

15 In 2000, the Attorney General was tasked with determining whether an agency should be
16 reimbursed for employees’ wages relating to a transfer project that required extraordinary use of
17 personnel. *See Op. Nev. Att’y Gen. No. 2000-31*, attached hereto as **Exhibit G**. It was the
18 Attorney General’s opinion that the nature of the records and data at issue required extraordinary
19 use of the agency’s employees. *Id.* at *4. The opinion further clarified that the cost of personnel
20 and resources are part of the “actual cost” incurred by the agency as described in NRS 239.055.
21 *Id.*

22 Similarly, in 2002, the Attorney General was asked to provide an opinion on whether
23 Washoe County may establish written standards to charge for extraordinary staff time
24 necessitated by an unusually burdensome request for copies of public records. *See Op. Nev.*
25 *Att’y Gen. No. 2002-32*, attached hereto as **Exhibit H**. The Attorney General determined the
26 authority granted to a governmental agency to recover actual costs for the “extraordinary use” of
27 personnel in retrieving and copying public records may have, at least in part, been intended to
28 make the agency whole in responding to nuisance inquiries or *any inquiry that takes up an*

1 *unusual amount of staff time.* *Id.* at p.245. (emphasis added). In defining extraordinary use, the
2 Attorney General found that public records requests should generally take no more than 30
3 minutes to respond and anything over the 30 minute mark was extraordinary. *Id.* Finally, the
4 opinion explains that the extraordinary use of personnel should be based on the actual hourly
5 wage of the lowest compensated individual reasonably available and qualified to respond to the
6 public records request. *Id.* at 246. It was the Attorney General's belief that this standard
7 comports with the definition of "actual costs" in Chapter 239 of NRS as being "the direct cost
8 related to the reproduction of a public record." NRS 239.005(1).

9 Although these opinions were rendered prior to the addition of the \$0.50 per page
10 limitation, they are nonetheless instructive in determining that LVMPD is permitted to charge for
11 staff time when extraordinary use of personnel is required, like the case at bar. As such, the
12 Court must now determine whether the \$0.50 per page limitation was specifically directed to *all*
13 costs involving the extraordinary use of personnel, including staff time, or just *copying* costs.

14 The Assembly Committee Hearing of May 3, 2013 regarding SB 74 is the most useful
15 legislative history to decipher this question. *See* Committee Hearing transcript, attached hereto
16 as **Exhibit I**. Through SB 74, Senator Segerblom introduced the \$0.50 per page limitation now
17 codified in NRS 239.055. During the last Assembly Committee Hearing, Senator Segerblom and
18 his intern, Taylor McCadney, were posed with a series of questions regarding the per page
19 limitation and its effects on circumstances requiring extraordinary use of personnel and other
20 related fees. The following exchanges occurred:

21 Senator Segerblom: . . .[T]hey can charge a reasonable fee of 50 cents. Under
22 extraordinary circumstances, the can charge additional fees. . . .

23 *Id.* at p.19.

24 Assemblyman Stewart: I appreciate you bringing this bill in order to save the
25 public money and give them more access. If someone from out of state or out of
country requested information, would this preclude the agencies from charging
the requester postage.

26 Senator Segerblom: This is actually a question I never thought of. We do not
27 have anything in the bill regarding postage, so I do not think it would. ***This is
basically only the copying charge, so I would assume it would not.***

28 *Id.* at p. 21. (emphasis added).

1 Taylor McCadney: Assemblyman Daly, the section that you are talking about is
2 section 4, subsection 1, where it states, "Except as otherwise provided in this
3 subsection, a governmental entity may charge a fee for providing a copy of a
4 public record. Such a fee must not exceed the actual cost to the governmental
5 entity to provide the copy of the public record unless a specific statute pr
6 regulation sets a fee" In section 4.5, it also goes into detail about how they
7 *can charge extra for extraordinary use of technology or manpower*. That is
8 where the leeway comes from for them to charge more than the actual cost of a
9 copy.

10 Assemblyman Daly: We knew it was a lot of paper and they charges us a fair
11 price based on their costs. They did include staff time and various things. . . .

12 *Id.* at p.23. (emphasis added). In sum, the entire purpose of the per page fee limitation was to
13 cap the costs associated with "copying" documents. The pre-preparations costs involving
14 extraordinary use of personnel and resources, including the manpower necessary to analyze,
15 review and redact information, went unaffected. Therefore, LVMPD requests this Court to find
16 it is permitted to charge for staff time at a reasonable cost LVMPD actually incurs. LVMPD also
17 requests an evidentiary hearing for this Court to hear testimony regarding the actually cost
18 LVMPD will incur as a result of producing these documents.

19 2. NRS 239.055 Applies to Electronic Data.

20 The Court incorrectly interpreted NRS 239.055 to only apply to hard copies or documents
21 with pages, rendering the statute inapplicable to electronic data such as 911 calls and BWCs.
22 Nothing in NRS 239.055 limits its application to actual documents or requires the exclusion of
23 electronic data. Rather, the per page fee limitation the Court relied on conforms to LVMPD's
24 interpretation of the statute whereby *copying* costs of documents must not exceed \$0.50.
25 Electronic data is nevertheless encompassed within NRS 239.055 as it explicitly allows a
26 governmental entity to recover the reasonable cost it actually incurs when extraordinary use of
27 personnel or technological resources is required. In reaching its conclusion, the Court essentially
28 determined that electronic data is not subject to the NPRA. To be sure, NRS 239.052 references
similar language as NRS 239.055. Specifically, NRS 239.052 provides in part:

[A] governmental entity may charge a fee for providing a copy of a public record.
Such a fee must not exceed the actual cost to the governmental entity to provide a
copy of the public record . . .

In comparison, the reasonable cost provision within NRS 239.055 reads:

1 . . . The fee charged by the governmental entity must be reasonable and must be
2 based on the cost that the governmental entity actually incurs for the extraordinary
use of its personnel or technological resources.

3 Neither of these provisions exclude nor apply only to electronic data. The Court's reasoning is
4 also flawed for the simple fact that NRS 239.055 encompasses technological resources. Any
5 interpretation excluding electronic data from NRS 239.055 is entirely flawed. There is no
6 dispute that the NPRA intended to include electronic data as a public record. Thus, the
7 production of public records requiring the extraordinary use of personnel, whether in hard copy
8 format or electronic data, is subject to NRS 239.055. As such, LVMPD requests this Court find
9 that NRS 239.055 also apply to Petitioners' request for 911 calls and BWC, the most labor
10 intensive responses.

11 **3. Requirements for Production are Unreasonable.**

12 This Court has ordered LVMPD to produce an insurmountable amount of information
13 within six months, despite Lt. Moon's declaration providing that initial review of the body worn
14 camera footage *alone* will take six months to review. Furthermore, the Court directed LVMPD
15 to begin producing public records within three business days from the date of the Order. Finally,
16 the Court concluded, without any supporting authority, Petitioners may make monthly
17 installments to LVMPD for the cost of production.

18 **a. The six month time limit is unreasonable.**

19 As part of its initial briefing, LVMPD shared that just to perform an initial review of the
20 BWC footage, it would take nearly 23 weeks for one individual. The entire process will likely
21 take over a year given LVMPD's limited resources. Likewise, LVMPD has upwards of 1,500¹⁶
22 documents relating to the 1 October Massacre. The page numbers associated with these
23 documents has yet to be determined. LVMPD also estimates 1,500 911 calls from the time of
24 the incident until 2:00 a.m. and closer to 2,000 911 calls in total. LVMPD maintains
25 approximately 350 hours of publicly owned CCTV video related to the incident. The sheer
26 amount of volume of information at issue plays a significant role in LVMPD's ability to disclose

27 _____
28 ¹⁶ In its Fee Brief, LVMPD provided that there was 800 reports.

1 these documents. In fact, the amount of data is so large LVMPD has to first transfer all of this
2 information to a separate server in order to be able to review and analyze all the content.
3 Furthermore, personal identifying information must also be redacted prior to any disclosure. As
4 mentioned earlier, this information is extremely graphic and LVMPD must take the mental
5 health of its employees into account when producing the requested documents.

6 Importantly, LVMPD has since informed Petitioners that the FBI is in possession of
7 evidence logs and information on Steven Paddock's weapons. LVMPD also notified Petitioners
8 that the requested dash cam footage and emergency purchase orders and no-bid contracts do not
9 exist. Additionally, all Parties agreed that reproduction of the search warrant returns and
10 affidavits of probable cause were not necessary. Thus, the only requested public records
11 remaining at issue are: (1) BWC footage; (2) 911 calls; (3) CCTV videos; (4) Dispatch
12 Information; and (5) Interview Reports. In the event this Court does find the public interest
13 outweighs LVMPD's interest in non-disclosure, LVMPD requests that it, at a minimum, is given
14 one year to produce the requested records on a rolling basis.

15 **b. Production of the requested public records within three**
16 **business days of the Court's order is not feasible.**

17 As mentioned above, LVMPD advised Petitioners of the public records not in its legal
18 custody or control, as well as the information that is non-existent. Actual production of the
19 remaining labor intensive documents is not only impractical, but impossible to produce within
20 three business days. The remaining categories all require significant review and, at least,
21 minimum redactions prior to disclosure. It is well-established that responding to public records
22 requests should not completely displace the function of the governmental entity. Any attempt to
23 begin such laborious production would force LVMPD to take employees away from their
24 everyday duties and, more than likely, incur overtime at the Department's expense. Moreover,
25 the Court's order conflicts with Nevada law, NRCP 62(a), which provides an automatic stay of
26 10 days from entry of the order. Given the volume of data involved, LVMPD requests that it be
27 able to produce the documents on a reasonable rolling basis.
28

1 **c. Petitioners must pre-pay for the production of documents.**

2 There is no doubt governmental agencies may charge for responding to public records
3 requests. *See* NRS 239.052, NRS 239.055. The NPRA, however, is silent on when payment to
4 the governmental entity is due. Nevertheless, NRS 239.055 is useful to determine the issue.
5 When extraordinary use of personnel or technological resources is utilized, the NPRA mandates
6 the governmental entity to inform the requester of the cost prior to preparing the information.
7 NRS 239.055. Logically, the requester would either accept or deny the costs associated with the
8 reproduction. The purpose of this requirement is to ensure payment to the governmental entity
9 prior to it utilizing extraordinary personnel or technological resources.

10 At the very least, when NRS 239.055 applies, payment should be made in advance or at
11 the direction of the governmental agency. *See* NRS 19.013(2) (allowing the county clerk to
12 demand payment prior to production).¹⁷ Again, the burden on LVMPD to produce the
13 documents is significant and payment prior to production is necessary to ensure LVMPD does
14 not waste time or resources in responding to the requests. This is consistent with LVMPD's
15 policy. Often times, LVMPD has responded to public records requests and the requested
16 information remains in LVMPD's possession for over a year. In turn, the requester never
17 collects the documents and LVMPD never receives payment for the copies. If payment is not
18 required until after LVMPD moves forward with production, Petitioners can easily claim they no
19 longer need the documents. In that instance, LVMPD would have expended unnecessary time
20 and resources and would have no remedy to recoup its loss. For these reasons, if LVMPD is
21 ordered to produce the documents, it requests that Petitioners pay the costs associated with
22 production in advance.

23 **D. STANDARDS FOR OBTAINING A STAY.**

24 In granting stay relief, this Court should consider the NRAP 8(c) factors, as favoring
25 LVMPD's entitlement to a stay, and to preserve the status quo: (1) Whether the object of the
26 appeal or writ petition will be defeated if the stay or injunction is denied; (2) Whether

27 ¹⁷ NRS 19.031 was revised at the same time NRS 239.055 incorporated the \$0.50 per page limitation
28 through AB 31 in 2013.

1 appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied;
2 (3) Whether the respondent/real party in interest will suffer irreparable or serious injury if the
3 stay or injunction is granted; and (4) Whether appellant/petitioner is likely to prevail on the
4 merits of the appeal. *See Hansen v. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000); *see*
5 *also Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (holding that
6 while no one factor is more important, "if one or two factors are especially strong, they may
7 counterbalance other weak factors").

8 In reviewing these factors, the Supreme Court has recognized that the purpose of a stay is
9 to preserve the status quo, which in this case means that production of public records should be
10 stayed until the Court enters an order on LVMPD's Motion for Reconsideration. *See Nelson v.*
11 *Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005); *see also U.S. v. State of Mich.*, 505
12 F.Supp. 467, 471 (W.D. Mich. 1980) (stating that the purpose of a stay is to preserve, not
13 change, the status quo). Therefore, this Court should consider the NRAP 8(c) factors and enter
14 the requested stay.

15 1. **The Object of LVMPD's Motion for Reconsideration Will Be**
16 **Defeated and LVMPD Will Suffer Serious Injury if a Stay is Denied.**

17 Very simply, if the status quo is not maintained, LVMPD will be compelled to begin
18 production of the public records by March 23, 2018 without appropriate payment for the
19 extraordinary use of its personnel. The purpose of LVMPD's Motion for Reconsideration is
20 two-fold. First, LVMPD is requesting the Court to reconsider its decision in ordering disclosure
21 of the public records. Second, if this Court maintains disclosure is appropriate, LVMPD seeks
22 reconsideration of this Court's order applying limitations on LVMPD's fees.

23 If the Court were to deny the stay, LVMPD would suffer serious injury because
24 compliance with the Court's order would waive and undermine the arguments made in the
25 instant Motion for Reconsideration. Furthermore, once the information is produced, it is
26 impossible to retract that information or even prevent Petitioners from disseminating the
27 information. Therefore, the Court should find that LVMPD satisfies the first two NRAP 8(c)
28

1 factors for entering a stay pending the Court's decision on LVMPD's Motion for
2 Reconsideration.

3
4 **2. Petitioners Will Not Suffer Any Serious or Irreparable Injury if a Stay is Granted.**

5 LVMPD's act of seeking stay relief does not in and of itself constitute harm to the non-
6 moving party for purposes of entering a stay. *See Hansen*, 116 Nev. at 658, 6 P.3d at 986-987.
7 A decision must be entered prior to March 23, 2018, the expiration of the automatic stay
8 pursuant to NRCP 62(a). Upon reassignment to another department, LVMPD will request that
9 this matter be heard on order shortening time as to prevent any prejudice to either Party.
10 Petitioners will not suffer any harm because LVMPD would not be able to produce any
11 documents within seven days, given the necessity to first gather all the data and transfer it to a
12 separate server before commencing review of the information. Therefore, the Court should
13 similarly conclude that LVMPD has satisfied the third NRAP 8(c) factor for granting a stay
14 pending appeal.

15 **3. LVMPD is Likely to Prevail on the Merits of its Appeal.**

16 In weighing this final factor, the Supreme Court has articulated that "a movant does not
17 always have to show a probability of success on the merits, [but] the movant must 'present a
18 substantial case on the merits when a serious legal question is involved and show that the balance
19 of equities weighs heavily in favor of granting the stay.'" *Hansen*, 116 Nev. at 659, 6 P.3d at
20 987. LVMPD presents at least serious legal questions to satisfy this final factor for entering a
21 stay pending the Court's order. There are two significant legal issues being addressed in
22 LVMPD's motion for reconsideration including: (1) Whether LVMPD's interest in non-
23 disclosure outweighs the public's interest in disclosure; and (2) If LVMPD is nonetheless
24 required to produce the public records, what is the appropriate fee it may charge for production.
25 These issues involve unsettled and contentious areas of the NPRA. Therefore, the Court should
26 determine that LVMPD has at least presented serious legal questions to satisfy the fourth NRAP
27 8(c) factor for entering a stay. This factor, in combination with the other three factors
28 demonstrates the necessity of the stay.

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IV. CONCLUSION

Based on the foregoing, LVMPD respectfully requests the Court grants its Motion for Stay Pending Reconsideration.

Dated this 16th day of March, 2018.

MARQUIS AURBACH COFFING

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S MOTION FOR RECONSIDERATION AND STAY PENDING RECONSIDERATION** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 16th day of March, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹⁸

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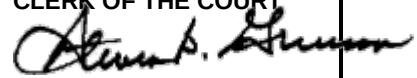
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¹⁸ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT G



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

AMERICAN BROADCASTING
COMPANIES, INC.,

Plaintiff,

VS.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Defendant.

AND OTHER PARTIES

CASE NO. A-17-764030-W
DEPT NO. XXIII

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

**STATUS CHECK RE: BRIEFING SCHEDULE OF LVMPD MOTION FOR
RECONSIDERATION AND REQUEST FOR STAY**

THURSDAY, MARCH 22, 2018

APPEARANCES:

FOR THE PLAINTIFF: JUSTIN A. SHIROFF, ESQ.

FOR LVMPD: JACQUELINE NICHOLS, ESQ.

FOR REVIEW-JOURNAL: ALINA M. SHELL, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

1 **LAS VEGAS, CLARK COUNTY, NEVADA, MARCH 22, 2018, 9:45 A.M.**

2 *** * * * ***

3 THE COURT: Hi, you guys. All right. So can you
4 just please introduce yourselves for the record, and I don't
5 think I've had an opportunity to meet you guys.

6 MS. SHELL: Good morning, Your Honor, Alina Shell on
7 behalf of the Review-Journal.

8 MR. SHIROFF: Good morning, Your Honor. Justin
9 Shiroff on behalf of the balance of the petitioners.

10 MS. NICHOLS: Good morning, Your Honor, Jacque
11 Nichols on behalf of the Las Vegas Metropolitan Police
12 Department.

13 THE COURT: Hi. You all can make yourself
14 comfortable.

15 Okay. So you all probably knew I had this case
16 before I did. I found out sometime on Tuesday morning, and
17 since then, you know, in between my other hearings I've tried
18 to go back through the record and get up to speed and
19 everything else.

20 And when I originally put this on calendar, it was
21 because there was a motion for reconsideration filed by Metro,
22 which obviously needed to get set, especially since you guys
23 requested that it be done on an order shortening time, and
24 there was an issue regarding a request for a stay since
25 apparently the first disclosure of the documents pursuant to

1 Judge Scotti's order is coming up. So we do need to address
2 all that, but I need some clarification from you guys.

3 And I'll tell you I've really only had, you know, the
4 last day and a half to digest this.

5 And this is more directed to Metro. When I looked at
6 your motion, okay, it kind of looks like, no offense, but it
7 kind of looks like the whole kitchen sink was thrown in there.
8 Because when I first started looking at it, there was -- and I
9 went back, and I looked at the original petitions and answering
10 briefs stuff that Judge Scotti has already considered, but
11 okay.

12 So the first part kind of talks about you disagree
13 with the release of the information, and that would be the
14 basis for your reconsideration; however, again just as in the
15 prior briefs, there's just not really any specifics. I mean,
16 it's kind of the same catchall phrase of ongoing investigation,
17 but there's really no specifics given. But the reason I say
18 that, so there's a small portion that discusses that, but it
19 really gives no new information.

20 But really it seems to be the greater issue or at
21 least what a lot of time was spent on in the motion was the
22 expense portion, and the man-hours and everything else that
23 would be needed in order to comply with Judge Scotti's request.
24 Now, I went back and tried to look at the record. It looks
25 like Judge Scotti did issue an order whereby he addressed some

1 of the expenses, but I don't -- I can't see, and maybe you guys
2 can tell me, I can't see that there was ever any other hearing
3 where there was a full discussion of what really was going to
4 be necessary in order to effectuate the production of all the
5 records requested. Is that accurate?

6 Because -- so when I read Metro's brief, they, you
7 know, they give me a breakdown of how much things can be; I
8 think it's like between 300,000 up to 500,000, you know, the
9 range, but I didn't see where there's ever really been a
10 discussion or a hearing to discuss those expenses because
11 there's a lot of other issues that come to my mind.

12 So did you all have a chance to really fully discuss
13 this before Judge Scotti?

14 MS. NICHOLS: So, Your Honor, at the status check,
15 which I cannot recall the specific date, there was kind of oral
16 argument discussing whether or not this matter required
17 extraordinary use of personnel, and if so, whether or not the
18 department could charge staff time, and that was really the
19 extent. As far as the actual numbers that the department could
20 charge, that was never kind of discussed. It was just whatever
21 was in the March 12th order.

22 THE COURT: Okay. So we still need to address really
23 the expense issue in more detail because --

24 I mean, let me ask this. Does Metro still want to go
25 forward with its reconsideration portion which is you think

1 there's a basis for not disclosing the documents ordered by
2 Judge Scotti?

3 MS. NICHOLS: Yes, Your Honor. Without getting full
4 blown into the merits --

5 THE COURT: I don't want to get into the merits
6 because they have not had a chance to respond, but I'm just --

7 MS. NICHOLS: Sure. Sure. Just some of our -- from
8 a broader standpoint, we believe that Judge Scotti didn't
9 address several issues that were addressed in the petition. So
10 that's part of the reconsideration, and then, yes, the other,
11 in addition to the fees, is that we do believe that disclosure
12 of all the documents is not appropriate.

13 THE COURT: Okay. So talking a little bit more about
14 the reconsideration portion, and obviously I'm assuming you
15 guys sitting at plaintiff's table or petitioners' table are
16 going to want a chance to respond; is that correct?

17 MR. SHIROFF: Yes, Your Honor.

18 MS. SHELL: Yes, Your Honor.

19 THE COURT: Okay. Just my cursory review of it,
20 because again I just got this case, you're going to need to
21 beef it up on that reconsideration because similar to what was
22 contained in the original objection by Metro it's just kind of
23 generalities. You know, basically again it's the catchphrase
24 "it's an ongoing investigation," and yet I don't think there's
25 any dispute.

1 I understand there may be ancillary litigation. You
2 know, the federal government is looking into different issues
3 related to the bump stocks and all those kind of things, or
4 there may be -- there's obviously going to be probably civil
5 litigation, but as far as the investigation, I think that
6 Sheriff Lombardo has said on several occasions that it doesn't
7 appear that there's anyone other than Paddock who was
8 responsible for this. So I'm not -- there needs to be some
9 elaboration as to what you're talking about.

10 MS. NICHOLS: Sure.

11 THE COURT: So with that being said, you're going to
12 need to do a supplement, and I know that you guys are going to
13 want a chance to respond. So and I don't want to delay this
14 too long because the shooting occurred in October, and these
15 records were requested a long time ago.

16 There's a secondary issue which really should not
17 have been part of the motion which is the cost issue, and I'm
18 sure -- and you need to -- again, that needs to be further
19 fleshed out because there's a lot of things that come to my
20 mind which I think you need to address.

21 I don't know as much about, you know, obviously media
22 and everything else as someone who's in the industry, and I'm
23 sure it is expensive, but there's a few concerns that come to
24 my mind.

25 Number one, looking at the items requested by the

1 media, a lot of those items would have been turned over had
2 Paddock lived and had this case been submitted to the district
3 attorney for prosecution. It is very common in a criminal case
4 to disclose to have a -- during the course of trial or during
5 the course of discovery to have the 9-1-1 calls, the body cam
6 footage, the dash cam, any and all things that were gathered as
7 a result of the police force's investigation. So those things,
8 had Paddock lived, those would have come out anyways. So I'm a
9 little bit confused as to why Metro is claiming there's a
10 privilege on those because it would have come out anyways had
11 Paddock lived.

12 And secondarily, you know, I think the reality of the
13 situation is we can all speculate -- and I don't know if
14 there's cases filed yet or not -- there's going to be civil
15 litigation on this. I would have a hard time believing there's
16 not going to be civil litigation, and many of the things
17 requested by the media are going to come out in the civil
18 litigation. I can almost guarantee you those lawyers
19 representing those injured and deceased parties are going to
20 request a lot of the same things, and my bet is it's going to
21 be disclosed during that time.

22 So kind of the point I was trying to get to, because
23 it would probably come out in criminal proceedings anyway, how
24 much expense would have been incurred anyways because -- if
25 this case -- if Paddock had lived? Do you see my point?

1 Because had Paddock lived, you all would have -- Metro would
2 have gathered everything up. They would have gotten the body
3 cam. They would have gotten all that stuff together, and they
4 would have turned it over to the DA. I don't know Metro's
5 inner workings. So I don't know if because they did not
6 believe there was any other shooters that they didn't go ahead
7 and have to do that, but some expenses would have been
8 incurred.

9 MS. NICHOLS: Yes, Your Honor. Without again getting
10 full blown into the merits --

11 THE COURT: But those are things you will need to
12 address.

13 MS. NICHOLS: Okay.

14 THE COURT: So I'm trying to put this out here
15 because I don't want to come to the hearing and have all these
16 questions and not have the information.

17 MS. NICHOLS: Sure.

18 THE COURT: I want to tell you what my initial
19 thoughts are, and I want that information provided to me when
20 we come back. Do you have any -- does Metro have any
21 questions? Because you're the one I really need to supplement.

22 And I know that you two want to say something.

23 MS. NICHOLS: No, that's it, and actually, Your
24 Honor, we discussed before you coming out kind of a briefing
25 schedule.

1 THE COURT: Uh-huh.

2 MS. NICHOLS: And so given your request for a
3 supplemental brief, I could have that on file by March 30th,
4 and if the petitioners are still in agreement with the current
5 briefing schedule --

6 MR. SHIROFF: Your Honor, we sort of contemplated
7 that the stay that's requested and the reconsideration are
8 really two very different things.

9 THE COURT: I haven't even gotten to that, yeah.

10 MR. SHIROFF: Right. And we realize that the
11 reconsideration would need probably more briefing and, you
12 know, again, not addressing the merits of it in anyway, what we
13 had contemplated was that the petitioners would have through
14 April 13th to provide their opposition to the motion.

15 THE COURT: I'm sorry. April 13th?

16 MR. SHIROFF: 13th. Friday, April 13th. And --

17 THE COURT: Okay. So hold on a second though. I
18 want to say something. And it's kind of a mess a little bit.
19 No offense to Metro, but these issues should not have all been
20 in one motion. Really you need to have your issues related to
21 the order ordering production. That should be a motion for
22 reconsideration. The other issues are not reconsideration
23 because they've never really been addressed on the merits by
24 the Court which are all these expenses and everything else.

25 And on the -- when you're -- I know that you're

1 taking notes. On the expense issue, the other thing I need for
2 you to address is --

3 And I'm sorry. I didn't mean to cut you off.

4 -- is redactions. There's a lot of discussion about
5 how much man-hours is going to be needed for the redactions;
6 however, you need to tell me what redactions you're thinking
7 because again, a lot of these, had there been a criminal trial,
8 a lot of stuff's going to come in as is.

9 MS. NICHOLS: And the redactions are pursuant to
10 Scotti's order on March -- he ordered all personal information.
11 So for instance, on the body worn camera videos, like if -- if
12 an officer is in direct contact with an individual, Scotti said
13 to essentially blur out that individual's face so there's no
14 identifying information, and that was in accordance with the
15 order.

16 THE COURT: That's going to be quite onerous.

17 MS. NICHOLS: I'm sorry?

18 THE COURT: I don't know, but see here's the thing.
19 You know, you -- I'm thinking through all the times we've had
20 body cam video in criminal cases, and I don't know that they've
21 gone to that of blurring out all the people around. I mean, so
22 Scotti had contemplated that you would basically blur out every
23 person's face that's in those videos?

24 MR. SHIROFF: So if there was -- kind of analogy that
25 he gave -- if there was a group of people running across, we

1 wouldn't blur those people out, but if an officer's having
2 contact with an individual and getting, like, personal
3 information and their body camera is on, we would, one, redact
4 the person's face, do like a blur, and then redact any personal
5 information they gave, date of birth, address, name, stuff like
6 that.

7 THE COURT: Okay. So hold that thought.

8 And what was your -- and I meant to go back on those
9 videos, and I just didn't have enough time to look at Scotti's
10 hearing. So what was your position? Did you want that
11 information?

12 MR. SHIROFF: Your Honor, I think we realized the
13 reality that the police likely spoke to innocent individuals,
14 and they likely spoke to victims who the media is not
15 interested in dragging further through this. So we were okay
16 with the concept, that we knew that redactions had to be done.
17 We don't think that most of the body camera footage would have
18 to be, but in a situation where an officer is directly
19 interviewing someone, maybe, but I don't imagine that that's
20 the majority of the footage. I would imagine that being -- and
21 I believe Judge Scotti's order, the hearing minutes and the
22 transcript all reflect that he contemplated the redactions
23 being the smaller portion of what was ordered.

24 THE COURT: Okay. So it sounds like you guys are
25 agreeable, and the reason I ask is because obviously that's

1 going to come into the expense portion since there is a law
2 that says you guys are going to be responsible for some
3 expense.

4 MR. SHIROFF: Of course. And it's never been the
5 petitioners' position that we weren't responsible for some cost
6 of production. It's the -- but as Your Honor stated, a lot of
7 this work would have been done anyway.

8 THE COURT: Yeah. Okay. So it sounds like you're
9 okay with the blurring of the body and people where you can
10 readily identify them. Okay. So that seems to be stipulated
11 to, and again I did not get the benefit of watching that full
12 hearing from Judge Scotti.

13 As far as other redactions -- and the redactions are
14 a large portion of what they say are going to be the expense of
15 this -- was there any other redactions you guys objected to?

16 MR. SHIROFF: Your Honor, I don't have the full list
17 in front of me. So we can -- we're happy to provide the Court
18 with a copy of the full transcript of the hearing as needed.

19 THE COURT: I can go back and watch it on JAVS. I
20 honestly have -- I was in court all day yesterday and Tuesday
21 so I didn't have a chance to, but I can.

22 MR. SHIROFF: But the parties do discuss at length
23 sort of the particulars of the redactions, and I believe Maggie
24 McLetchie, cocounsel representing the RJ, discussed kind of at
25 length sort of the bounds of what we thought needed to be

1 redacted versus not, and we were definitely in the position of
2 redacting less.

3 THE COURT: Sure.

4 MR. SHIROFF: We don't feel like there needed to be a
5 lot of redactions except for those rare instances where
6 particular footage would necessarily disclose someone's
7 personal information that, you know, might otherwise be
8 redacted from the court record.

9 THE COURT: Okay. So it sounds like you're not
10 disputing that. So I'm trying to think of other things that
11 would have been redacted. So I guess the same could be said
12 with the dashboard footage. Let me get my list of everything
13 that we're talking about.

14 The other thing, and they come up in criminal trials,
15 is the 9-1-1 calls. They're in criminal trials all the time,
16 and the individual who makes the calls, always listed as a
17 witness. So their identity is known, and we never or we
18 rarely -- no, I can't think of a reason. I don't think we've
19 ever redacted out the name of the individual who's calling in
20 making the 9-1-1 call. Did you all agree to redact that
21 person?

22 I don't know that you need it for your purposes, but
23 I don't know that it's really going to be a secret.

24 MR. SHIROFF: Again our position was that it's not --
25 I wasn't -- I didn't actually argue that original hearing, but

1 again, if it's something uniquely personally identifying, if
2 the witness is giving their home address, if for some reason,
3 there is something unique about a given call where the witness
4 is giving out information that would otherwise be --

5 THE COURT: They're going to give their name.

6 MR. SHIROFF: But names are I don't think necessarily
7 by themselves something that had to be redacted, but if they're
8 giving, you know, my phone number is, my address this, that
9 might be where we would be a little bit more sensitive to what
10 was present on the call or the transcript, but again we didn't
11 imagine that being the majority of the calls.

12 THE COURT: Okay. So maybe the better way to do this
13 is they do their supplement, and they're going to supplement as
14 far as you need to be more specific as far as expenses involved
15 because again, the redaction is a major issue, but it sounds
16 like some things they may stipulate to on the redaction, other
17 things they may not. So perhaps when you break it down a
18 little more fully they can in their opposition, if there is
19 one, tell me why it should or should not be redacted. I think
20 that would be the easier way to do it.

21 MS. NICHOLS: And I completely understand, Your
22 Honor. The only trouble I foresee is, for example, with the
23 body cam footage, the only way to know exactly what we're
24 redacting is to go and review it, and it took a team of eight
25 people 60 days just to review it for the investigation

1 purposes. To go back and -- and that's part of our cost issue.

2 THE COURT: Well, that's part of the question. How
3 much more -- so presumably some stuff has been done, okay. So
4 how much -- you wouldn't have to completely re-create the wheel
5 I would think. How much more would have to be done? So it
6 would be like costs on what additional would be incurred after
7 what's already been done.

8 MS. NICHOLS: Nothing has been done to the extent for
9 disclosing it to the media. So they reviewed it for
10 investigation purposes, and so they would have to go back and
11 review how many times they had individual contact with one
12 person, and there were hundreds of officers involved, and, I
13 mean, we have 700 -- approximately 750 hours of body cam. So,
14 I mean --

15 THE COURT: So maybe break up the redaction because
16 that's apparently something they're not disagreeing with. So
17 break up the redaction by the different things.

18 MS. NICHOLS: Okay.

19 THE COURT: And I'm just kind of going off the top of
20 my head --

21 MS. NICHOLS: Sure.

22 THE COURT: -- having seen all this stuff in criminal
23 trials.

24 MS. NICHOLS: Sure.

25 THE COURT: That would be a better, I think, easier

1 way to do it.

2 MR. SHIROFF: And, Your Honor, prior to Judge
3 Scotti's disqualification, something that all counsel had
4 agreed to is that we will be providing Metro with a more
5 focused list of sort of radiating out from center point of
6 which body camera footage we would like first which will enable
7 them to focus on these officers, these times, moving out and
8 allowing them to prioritize who needs to -- you know, if there
9 are redactions, if there are those kinds of things.

10 We just -- part of the issue of this case is we still
11 don't have a list of what's available. We don't know what the
12 universe is so that we can narrow it. So I guess we --

13 THE COURT: Okay. So what do you want a list of?
14 Everything that came out they did a part of the criminal
15 investigation? Because on the body cam, usually you can figure
16 out who's supposed to -- the body cam, not every officer has to
17 wear a body cam. It depends on their P number. It depends on
18 a lot of things as far as the way Metro negotiated the body cam
19 issue. So but usually you can go -- you can go through, and
20 you probably know which officers were on the scene, and you can
21 go and determine which of those officers would have been
22 required to wear the body cam. So that would narrow down the
23 number of body cam. They want that information apparently.

24 Shoot, I lost my train of thought.

25 Same thing with the dashboard cam. Have you given

1 the petitioners like a list of everything that was obtained
2 during the course of the investigation? Because that's usually
3 not private. That's usually part of what you send over to the
4 district attorney.

5 MS. NICHOLS: We have given them a list of documents
6 that we do not have. So basically all the public records
7 request that they made, we I believe like a week ago or
8 something I did talk to counsel on the phone and send a letter
9 of all the documents that we do not have in our possession that
10 they've requested.

11 THE COURT: Okay. But the -- their requests were
12 kind of general, but I think it's because they don't know
13 specifically what was there. I mean, they basically, to put it
14 in a nutshell, they requested any and all things that Metro
15 gathered or utilized in the course of its investigation, and
16 usually those are pretty standard, I mean, as far as, you know,
17 them talking to witnesses and all the other things. Have you
18 just provided them with a list of everything?

19 MS. NICHOLS: No, we have not because it's not in
20 just one single database. There are a slew of different
21 databases, and unfortunately, this is not just a single
22 homicide. This involved 58 people, people from out of state,
23 and so it is -- it's not a normal case --

24 THE COURT: Well, it is and it isn't.

25 MS. NICHOLS: -- where we would just hand a case file

1 over to the DA.

2 MR. SHIROFF: Your Honor --

3 THE COURT: Hold on a second. What you're going to
4 hand the DA though, you're going to hand them any witness
5 statements. You're going to hand the DA -- just and this is
6 off the top of my head -- you're going to hand them 9-1-1
7 calls. You're going to give them body cam. If not, it's going
8 to be subject to disclosure during discovery because of the
9 Henthorn case. You're going to provide them during the course
10 of a criminal case, if there's surveillance video from any
11 surrounding buildings, that's ordinarily as part of these
12 investigations stuff that Metro will obtain. I mean, that's
13 one thing that would be turned over.

14 So I think they just want this list of all the stuff
15 you have, and that sounds like -- I don't know why that would
16 be onerous to turn that over. I mean, you know who Metro
17 talked to as far as part of the investigation. You -- I mean,
18 you can get who -- the list of the P numbers who should have
19 been wearing the body camera. You know there's X number of
20 9-1-1 calls. So why can't you just give them a list? That
21 might even narrow down what they want because I know that you
22 know all those things because you would need it for a criminal
23 investigation.

24 MS. NICHOLS: And I -- I --

25 THE COURT: And investigative reports, that's

1 something else that they would do because they take all their
2 written notes, and they compile them.

3 MS. NICHOLS: Correct, Your Honor. And those
4 investigative reports are still being compiled because we had
5 every single officer who responded to the scene write a report,
6 and so --

7 THE COURT: Okay. So the ones you do have, why can't
8 you say -- why can't you give them a list? You know,
9 investigative report by Joe Blow. Investigative report by Sue.
10 I mean, and just give them the list of the ones that --

11 MS. NICHOLS: Because I don't think that we have just
12 a list. I think what we have is a database full of all the
13 reports, and so essentially someone would have to go in and
14 say, okay, these are the individual reports --

15 THE COURT: Okay. So --

16 MS. NICHOLS: -- that's creating a record.

17 THE COURT: Sure. So how in your computer system do
18 you do it? Do you do it by event number? Because I'm assuming
19 this was assigned an event number.

20 MS. NICHOLS: It was. And because of the trickling
21 effects afterwards, so for instance I think up to two weeks,
22 even a month after this event, we had witnesses and victims
23 still coming. So there's one event number, but there's also, I
24 think, up to a thousand associated event numbers.

25 THE COURT: Okay. Well, I mean, the thing is it's

1 been five months. It doesn't sound like you guys have started
2 at all on trying to gather this information. I think that they
3 should be provided something because -- and I'm going to go
4 back to where I started out this hearing. I think the problem
5 in the briefs -- I think the problem in issuing a good ruling
6 from this hearing is everything that was done in Metro's
7 opposition is --

8 Well, let me go back even further. Everything when
9 there was a public -- there's a Freedom of Information Act
10 request. Metro responded at least to a few of the requests
11 okay, and it was just this blanket general statement of there's
12 an ongoing investigation, and that's just kind of where was
13 left, and there's not any additional information that's being
14 provided. So it's really hard, and I'm sure it was hard for
15 Judge Scotti, too, to issue rulings as far as what should or
16 should not be subject to the freedom of information request
17 because quite simply, you don't --

18 I mean, no one really has a list of what's out there,
19 and that's what really needs to be provided, and Metro keeps
20 objecting, and so Judge Scotti, my guess is he's left with the
21 only situation he has is just to issue a blanket ruling of,
22 hey, turn over everything, and you guys are objecting to that,
23 but there's just -- and you're saying, oh, parts and parcel.
24 Parts of what he ordered are not subject to the Freedom of
25 Information Act request, but you don't tell anyone what.

1 MS. NICHOLS: I believe we did. It was the CCTV
2 video from the hotels, and everything else that we obtained as
3 evidence.

4 THE COURT: Okay. So let's say you turn on the CCTV,
5 the Close Caption TV. I'm assuming that's what it stands for.
6 Okay. So then let's go back. Then you have all these other
7 subcategories which you're saying we shouldn't turn over things
8 in those subcategories, or it's too onerous, or we can't gather
9 it, but you don't give any specifics. And as I've indicated,
10 those would come up anyway -- would have come out anyways had
11 Mr. Paddock not died.

12 So the 9-1-1 calls, no specifics on that one. The
13 body cam footage, really no specifics. Dash camera -- the CCTV
14 videos, yeah, you gave specifics. Evidence logs, nothing.
15 Dispatch information, no specifics. Interview reports, no
16 specifics. Search warrant returns, that's actually addressed
17 by Judge Cadish. And affidavits of probable cause, I'm
18 guessing she probably -- that's part of hers, too.

19 MS. NICHOLS: She addressed those, too.

20 MR. SHIROFF: Yeah.

21 THE COURT: Because that's part of the search
22 warrant. Gotcha. And then the purchase order and no-bid
23 contracts. But there's just no specifics, and I understand
24 that Metro's claiming that it doesn't have to do a privilege
25 log, but the very purpose of a privilege log is to -- I don't

1 think the purpose of the Freedom of Information Act is just to
2 blanketly say that these items are not subject to production.
3 But that's kind of what you're doing.

4 I mean, the privilege log is basically to go through
5 and say, hey, this has a specific rule either legally, there's
6 a law that says, hey, it's not discoverable, or it's not
7 subject to production because of this reason, but you can't --
8 I mean, all you've done is just dump it all in the kitchen
9 sink.

10 MS. NICHOLS: Well, with respect to the privilege
11 log, nothing in the Nevada Public Records Act requires us to
12 provide a privilege log, and, you know --

13 THE COURT: Well, that's your problem because, I
14 mean --

15 MS. NICHOLS: Respect to -- essentially, again, I
16 don't want to get into the arguments, but in looking at pages
17 13 through 14 of our --

18 THE COURT: I have it right here.

19 MS. NICHOLS: -- motion, in essence what we're saying
20 is we don't have a problem providing some of these documents.
21 Our issue is is that by providing everything, we're going to
22 reveal our investigative techniques.

23 THE COURT: Well, let me put this a different way,
24 okay, and here's the thing. It is not really up to Metro or
25 any other entity to decide what legally should be turned over.

1 You have a right to dispute that there is a legal basis to turn
2 it over, but it's not -- the ultimate decision is not up to
3 you. It's up to the courts. That's why we're here, why we
4 have our jobs.

5 But the way you're doing it is making it very
6 difficult for the Court to do its job, and that's why the
7 rulings which you're objecting to have been these broad and
8 expansive rulings because there's no specifics for the Court to
9 be able to go back. The Court -- you have not made it, the
10 Court, able to go through and look at all the different items
11 and see whether what you're claiming is correct, whether there
12 are certain things that are not subject to being disclosed. Do
13 you see my point? It's not Metro who gets to decide.

14 MS. NICHOLS: I agree with you. I --

15 THE COURT: Okay. But you've got to give the Court
16 the information it needs to consider your position.

17 Yes, ma'am.

18 MS. SHELL: Your Honor, thank you. And I agree with
19 counsel that the NPRA doesn't specifically require a privilege
20 log, but I would point out that the Gibbons case from the
21 Nevada Supreme Court said that in a case like this this is
22 precisely why a privilege log is needed, to address the
23 concerns that Your Honor has.

24 And I know Ms. McLetchie has expressed to counsel
25 before that having a privilege log of the items that Metro has

1 in its possession would enable petitioners to narrow their
2 request because we understand our requests were really broad
3 because it was a wide net we had to cast, and if we had a
4 privilege log, we would be able to go through it and then work
5 with counsel to identify which specific documents we need and
6 thus limit any, you know, expense that is incurred by Metro or
7 by petitioners.

8 THE COURT: I'm trying to think of the best way to
9 sort this out.

10 MS. NICHOLS: And, Your Honor, if I may, we
11 understand -- we understand that a privilege log would be
12 helpful, but the problem is is that we would literally have to
13 comb through everything first before providing any sort of list
14 of what we have.

15 THE COURT: And I hear what you're saying, and you've
16 set forth very well how much work goes into it, and I have no
17 doubt that that is in fact the case. The problem is, and I go
18 back to this, the way you're handling it right -- not you, but
19 Metro's current position basically says we're the one who's
20 going to make the final decision, you know, whether or not it's
21 subject to release or it's not subject to release, and that's
22 not Metro's role. If you want --

23 That's the Court's ultimate role, and again, you're
24 objecting to the broad expansive rulings that have been
25 previously issued in this case, but they were -- I think they

1 were largely necessitated because no one knew any specifics.
2 So it's just like you're trying to figure out what's out there.
3 So it's like if you don't give me specifics and you don't tell
4 me why certain items are subject to not being released, then
5 I'm going to have to issue a blanket ruling and say, hey,
6 they're all subject to release, and that's the problem. So and
7 we've had a lot more discussion than I had intended, and I
8 apologize for that, but I want this to be a little bit more
9 clean cut.

10 I think that we talked about the motion for
11 reconsideration, and I've already told you you've got to beef
12 it up because again, as I've said a few times, you're objecting
13 to the expansive nature of Judge Scotti's ruling, but in order
14 to get away from that, in order for the Court to be able to
15 consider your request, again, you need to go through and say
16 specifically why certain things are not subject to disclosure,
17 and so really the only way I can see to do it is a privilege
18 log. And then we have the second issue we need to parse out
19 which is the expenses, but I think that we've discussed all
20 this at length.

21 Is there anything else that I didn't think of that
22 you guys want to bring up? And I know that now we have -- I
23 know that you had come up with a schedule for all this, but I
24 don't -- I don't know where I wrote it down. You basically
25 have two issues.

1 So okay. On the motion for reconsideration, give me
2 your dates again. You wanted how long to supplement?

3 MS. NICHOLS: I could have a supplement by next
4 Friday on the 30th.

5 THE COURT: And then you would want a response.

6 MR. SHIROFF: That's correct, Your Honor. We had
7 previously agreed to April 13th, but that was when we thought
8 it was just the motion itself.

9 THE COURT: Well, I'm separating them out because I'm
10 going to give you -- because we're going to separately talk
11 about the expense issue, okay.

12 MR. SHIROFF: Okay. Then April 13th should be just
13 fine to oppose the -- that first chunk of the reconsideration.

14 THE COURT: Okay. And so I don't know if you want to
15 do a reply or not. I don't want this to be too far out. Do
16 you think you're going to want to reply?

17 MS. NICHOLS: I mean, I could have a reply done in a
18 week.

19 THE COURT: Okay.

20 MS. NICHOLS: Which would be the 20th.

21 THE COURT: Okay. And then, Carmen, when can we set
22 them for hearing?

23 THE CLERK: Is April 27th okay? 10:00 a.m.?

24 MS. NICHOLS: That works for me.

25 THE COURT: Okay.

1 MR. SHIROFF: We'll make it work, Your Honor.

2 THE COURT: So then let's discuss -- part of that
3 would be the stay issue because I know you guys want to discuss
4 it because the documents are supposed to start rolling out this
5 week. So you guys really are the ones that have the issue.

6 MR. SHIROFF: I mean, Your Honor, it's been our
7 position all along that in this entire universe of documents
8 that Metro has and should have at least gone over in some
9 portion over the last five months there has to be something
10 that isn't controversial. There have to be some documents that
11 aren't part of this larger dispute over what should be or
12 shouldn't be produced.

13 We would have said those should have been coughed up
14 by the deadline, but we understand that if Metro is challenging
15 the propriety of the order as a whole, and if they're
16 challenging the categories of documents and Judge Scotti's
17 expansive ruling, we understand that there are certain
18 realistic aspects of this we have to deal with, and if the
19 Court is inclined to stay the production temporarily while it
20 considers, you know, while it considers the underlying order,
21 we understand the reality of that.

22 But it is our position that even if the
23 reconsideration happened, and there were some specific items
24 that were ultimately withheld from production, there have to be
25 things that as Your Honor say would have come out already and

1 would have come out as part of a criminal proceeding. So there
2 have to be some things that are eligible for production.

3 So if Metro is going to supplement and provide a
4 privilege log and come up with a specific list of things that
5 it's really interested in fighting over whether or not it
6 should produce, that leaves a subset of things that, I mean,
7 stated as to the use items the rest should be fair game.

8 THE COURT: Okay. So at most the State would be till
9 the 20th with the caveat that would -- I'm sorry, not the 20th,
10 the 27th which is the date of the hearing, with the caveat
11 though this has now gone on for months, okay, and with the
12 caveat that should Metro not prevail on its position for the
13 motion of reconsideration, that turnout -- that turn over of
14 documents is going to start immediately, okay. So just be
15 prepared.

16 Next issue, because assuming you don't prevail, we
17 have the cost issue and the redaction issue. So could we
18 actually do that the 27th as well, or is that just too much for
19 you guys to get together? Because you've done some of it. You
20 just need more of a breakdown.

21 MS. NICHOLS: I think we could handle it on the 27th
22 as well.

23 THE COURT: But it might be easier to do it in two
24 different briefs because the standards are different.

25 MR. SHIROFF: I think, Your Honor -- I think Your

1 Honor hit that on the head, so to speak. If Metro's going to
2 come up with a list, and if Your Honor does ultimately in some
3 way modify the ruling and does narrow the field in terms of
4 maybe there are specific things or different types of
5 reactions, whatever the ruling ends up being, then we should
6 have a much clearer picture whereby Metro's people and
7 potentially if we decide to retain someone who could talk about
8 what that should actually cost to produce, I think it makes
9 sense to have that be a subsequent thing.

10 But I think that with the media companies that we're
11 talking about, this isn't a private individual where the
12 ability to pay for the production is an issue, production
13 should start, and production should go immediately while we
14 sort out the larger cost issue.

15 THE COURT: Okay. And so, I mean, really truly you
16 all's request overlap. So I'm sure whatever we come up with
17 the final cost, I'm sure you guys are going to share it.

18 MR. SHIROFF: Yes.

19 THE COURT: And then that brings me up to the two
20 other issues you brought up, and I think they're kind of
21 nonissues. Like there's two entities. I think it was a
22 Washington Post, and is it KSNB -- no -- yes, KSNB that I guess
23 they didn't make a -- I didn't go back and double check -- did
24 not make a public records request, and yet they're petitioners
25 in this case. Frankly, I'm sure what they're requesting is the

1 same what every other media outlet wants. So I don't know as a
2 practical matter it's going to make that big of a difference
3 because whatever they get, KSNB and the Washington Post is
4 going to get, too. Plus, if they want it, they're going to
5 have to pay for it.

6 MS. NICHOLS: Our concern is, Your Honor, is later on
7 coming down for a motion for fees and costs on attorneys' fees
8 were they're going to claim attorneys' fees and costs.

9 THE COURT: Oh, I see where you're coming from.
10 Okay. Who represents Washington Post and KSNB?

11 MR. SHIROFF: Your Honor, that would be my office.

12 THE COURT: Then you need to clean it up. As a
13 practical matter, they're going to get the documents probably
14 regardless of whether they're involved in the litigation or
15 not, but you need to clean it up. She does have a legitimate
16 concern.

17 MR. SHIROFF: Any allegation then we make for fees
18 wouldn't be made in the names of those two, who, as Your Honor
19 stated, would be real parties of interest and obviously have a
20 vested interest in the documents being produced, but we
21 understand the underlying point.

22 THE COURT: Okay. So we'll make that a court order.
23 Because they're not -- because they did not do a freedom of
24 information request that they are not allowed to claim any
25 right to fees or costs under the rules.

1 MR. SHIROFF: As to those two petitioners, that's --

2 THE COURT: Okay. But they'll be allowed to stay in
3 because you guys are going to divvy up the expenses.

4 MS. NICHOLS: That was our only concern, Your Honor.
5 So I'm fine with that.

6 THE COURT: So I think that's -- because that is
7 substantive, I do need an order from today's hearing.

8 MS. NICHOLS: Okay.

9 THE COURT: Which is going to set forth the briefing
10 schedule, and again, don't throw it all together. Parcel it
11 out. I know that my initial brief is all parceled together. I
12 want reconsideration, and then I want the cost issue, but I
13 guess it doesn't matter if we're doing the cost second, but I
14 don't want it all together, and then do an order for me,
15 please.

16 MS. NICHOLS: Not a problem, Your Honor. So just for
17 clarification, the fee -- any supplemental fee briefing, do you
18 want that after the initial --

19 THE COURT: I think the petitioner is saying that it
20 would probably be more prudent because --

21 MS. NICHOLS: And I agree.

22 THE COURT: -- you don't know what I'm going to say.

23 MS. NICHOLS: Sure. Okay. I just wanted to make
24 sure.

25 THE COURT: Okay. And then I think that's all

1 made -- okay. One, if I haven't already said it because this
2 hearing has gone on longer, I know that Scotti recused, and I
3 just want to put it out there. I don't see any reason I cannot
4 sit on this case, but, like, everyone else in Las Vegas, I, you
5 know, within some degree I know someone that was involved in
6 this incident, but I don't really see it as being an issue.
7 I'm just putting it out there. I don't have any close friends
8 that were killed or injured or anything else, but, you know,
9 I've lived in Las Vegas for the last 22 years. I do know
10 someone who's been impacted.

11 MS. SHELL: As do we all, Your Honor.

12 THE COURT: Okay. I just want to put that out there.

13 MS. SHELL: I have a very noncontroversial procedural
14 issue for Your Honor.

15 THE COURT: Yes, ma'am.

16 MS. SHELL: We had submitted apparently while you
17 were in court, we had submitted a stipulation to extend the
18 briefing schedule.

19 THE COURT: Okay.

20 MS. SHELL: -- on any motion for attorneys' fees. I
21 have a new signed copy today.

22 THE COURT: Did I sign that?

23 MS. SHELL: You may have, but unfortunately, the
24 versions that we submitted to you, one of them got damaged in
25 scanning, and so I brought a nice clean copy, Your Honor.

1 THE COURT: Okay. Like I said, I walked in on
2 Tuesday, and there was a pile of stuff on my desk, all related
3 to you individuals.

4 MS. SHELL: A little welcome back present, Your
5 Honor.

6 THE COURT: I really appreciate it.
7 There you go.

8 MS. SHELL: Thank you.

9 THE COURT: All right. So we'll see you it looks
10 like the end of April. If you guys have any questions, just
11 call us and let us know. I mean, we can just do a Court Call.
12 I mean, we can just do a conference call or something because I
13 did spit out a lot of stuff for you guys to look into further.
14 Thank you.

15 (Proceedings recessed to 10:23 a.m.)

16 -o0o-

17 ATTEST: I do hereby certify that I have truly and correctly
18 transcribed the audio/video proceedings in the above-entitled
19 case.

20

21

Dana L. Williams

22

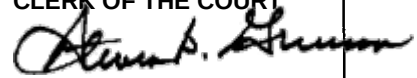
Dana L. Williams
Transcriber

23

24

25

EXHIBIT H



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Attorneys for Las Vegas Review-Journal

DISTRICT COURT
CLARK COUNTY, NEVADA

American Broadcasting Companies, Inc.; The
Associated Press; Cable News Network, Inc.;
Chesapeake Media I, LLC, d/b/a KSNV-TV; Los
Angeles Times Communications, LLC; The New
York Times Company; Scripps Broadcasting
Holdings, LLC d/b/a KTNV-TV; and WP
Company LLC d/b/a The Washington Post

Petitioners,
v.

Las Vegas Metropolitan Police Department,

Respondent.

CASE NO. A-17-764030-W
Consolidated Case No.: A-17-764169-W

DEPT. XXIII

**JOINT OPPOSITION TO MOTION
FOR RECONSIDERATION AND STAY
PENDING RECONSIDERATION**

1 LAS VEGAS REVIEW-JOURNAL,
2
3 Petitioner.
4
5 v.
6 LAS VEGAS METROPOLITAN POLICE
7 DEPARTMENT,
8
9 Respondent.
10

11 COMES NOW Petitioners American Broadcasting Companies, Inc. ("ABC"), the
12 Associated Press ("AP"), Cable News Network, Inc. ("CNN"), Chesapeake Media I, LLC, d/b/a
13 KSNV-TV ("KSNV-TV"), Los Angeles Times Communications, LLC ("*Los Angeles Times*"),
14 The New York Times Company ("*The New York Times*"), Scripps Broadcasting Holdings, LLC
15 d/b/a KTNV-TV ("KTNV-TV") and WP Company LLC d/b/a The Washington Post
16 ("*Washington Post*"); and the Las Vegas Review-Journal ("LVRJ", and collectively,
17 "Petitioners"), by and through their undersigned counsel, and hereby submit this Joint
18 Opposition¹ to Las Vegas Metropolitan Police Department's ("Metro") March 16, 2018, Motion
19 for Reconsideration and Stay Pending Reconsideration (the "Motion").
20
21
22
23
24

25 ¹ This limited Opposition is intended only to address: (1) the immediate impact of Metro's
26 failure to comply with this Court's order and file its supplemental brief; and (2) resolve the
27 tension that now exists between the instant proceeding and the pending appeal. To the extent that
28 the matter returns to this Court for full consideration of the merits of the Motion, Petitioners
reserve the right to separately address any remaining substantive issues. For example, Petitioners
were entitled to file a counter-motion for reconsideration, which would have been due at the
same time as its opposition to the Motion had Metro obeyed this Court's briefing schedule.

1 This Opposition is made and based on the following Memorandum of Points and
2 Authorities, the Declaration of Justin A. Shiroff ("Shiroff Declaration", attached here as Exhibit
3 1), the pleadings and papers on file herein, and any oral argument the Court may consider on the
4 Petition.

5 DATED this 4th day of April, 2018.

6
7 By: /s/ Justin A. Shiroff

8 Joel E. Tasca
9 Nevada Bar No. 14124
Justin A. Shiroff
Nevada Bar No. 12869
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

11 By: /s/ Margaret A. McLetchie

12 Margaret A. McLetchie
13 Nevada Bar No. 10931
Alina M. Shell
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701 E. Bridger Ave., Suite 520
Las Vegas, NV 89101

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In the approximately six months since the One October massacre, Metro has engaged in a
4 pattern of gamesmanship and obstructionist litigation with one goal – to escape its obligation to
5 produce the public records to which Petitioners are rightfully entitled. Indeed, it has refused
6 every single request for public records, and has not produced a single page. In contrast, the 911
7 calls relating to the Parkland shooting have already been publicly disseminated. The public has a
8 right to access Metro records regarding One October and Metro is interfering with those rights
9 by delaying and complicating litigation unnecessarily.

10 Metro's latest delay tactics have included filing a premature Notice of Appeal instead of
11 providing this Court with the supplemental brief that it ordered at the March 23, 2018 Status
12 Check. This follows Metro's refusal to waive disqualification of Judge Richard Scotti, despite
13 that Judge Scotti's potential bias, if any existed, only would have benefitted Metro. The sole
14 motivation for Metro's refusal to waive Judge Scotti's disqualification is evident – Metro wanted
15 to get a second-bite-at-the-apple on reconsideration before a different judge after Judge Scotti
16 had ruled adversely to Metro. Sensing at the status check that this Court – like Judge Scotti –
17 would not rule in Metro's favor on reconsideration, Metro is now trying to abandon ship once
18 again by filing a Notice of Appeal to try its hand before the Supreme Court. Thus, it appears that
19 whenever Metro feels the winds of fortune beginning to turn on it, it undertakes the next
20 available iteration of forum shopping in the hopes of avoiding the inevitable.

21 The Court must deny the Motion for multiple distinct reasons. Initially, Metro's failure to
22 properly supplement its otherwise deficient Motion should be viewed by this Court as a contempt
23 of this Court's order² and is grounds for the Court to summarily deny the Motion. Moreover, this
24 Court indicated that without a sufficiently detailed supplement, the Motion facially failed to
25 establish a prima facie case for reconsideration. In addition, the Court must deny the Motion to
26

27 ² A copy of the proposed order following the March 23, 2018 Status Check is attached here as
28 Exhibit 2. All parties have signed the Order and are awaiting its submission to this Court for
signature.

1 reconcile the tension between this Court and the Nevada Supreme Court due to Metro's
2 premature filing of the Notice of Appeal.³ The Court should deny the Motion without delay.

3 II. FACTUAL BACKGROUND

4 On March 2, 2018, Judge Scotti entered his Order requiring disclosure of the public
5 records requested by the Petitioners in this action. On March 9, 2018, Judge Scotti entered his
6 Order detailing the cost/repayment structure that was to be applied to the production of the
7 public records requested by Petitioners. On or about March 12, 2018, Judge Scotti issued a
8 Minute Order, indicating that unless the parties to this action waived disqualification on or
9 before March 16, he would disqualify himself. *See* Minute Order, March 12, 2018, attached here
10 as Exhibit 3. Judge Scotti's disqualification was predicated on the idea that he might be viewed
11 as potentially biased **in favor of Metro**. However, where all Petitioners waived their rights to
12 disqualification (which would avoid delays), Metro took that opportunity to refuse to waive,
13 guaranteeing that it would get a new Judge for the second time in this case (after using their
14 peremptory challenge on Judge Crockett in the earliest days of the litigation).

15 Contemporaneously with the disqualification issue, Petitioners proceeded in good faith
16 with the ordered production process. Throughout the litigation, they have endeavored to obtain
17 information about the responsive records that exist and to work with Metro. Most recently, on
18 March 14, 2018, in the spirit of facilitating a more rapid disclosure of the body-worn camera
19 footage, undersigned counsel Justin Shiroff sent Metro's counsel a letter that substantially
20 narrowed the footage Metro needed to prepare before its first required disclosure on March 16,
21 2018.⁴ Shiroff Declaration at ¶¶4-6. Metro refused to produce the single ninety-minute section of
22 body-worn camera footage that Petitioners identified for initial production. *Id* at ¶7.

23 In the meantime, Metro filed its Motion for Reconsideration, facially admitting that it
24

25 ³ Petitioners anticipate that Metro might attempt to withdraw or otherwise vacate the Motion.
26 This Opposition should prevent the Motion from being withdrawn under EDCR 2.20. Moreover,
27 the Court already partially granted the relief requested in the form of a temporary stay of Metro's
production obligations. The Motion cannot be withdrawn where it has already been ruled upon
(even in part).

28 ⁴ A copy of the letter from Justin A. Shiroff to Jackie V. Nichols is attached here as Exhibit 4.

1 anticipated not only a judicial reassignment, but that it would seek an Order Shortening Time
2 from whomever the new judge was. *See* Motion at p. 1, n.1 (“[I]t is LVMPD’s understand [sic]
3 Judge Scotti will enter an order of disqualification on March 19, 2018. Once the matter is
4 reassigned to a new department, LVMPD will request that this motion be heard on order
5 shortening time.”).

6 Accordingly, on March 19, 2018, the case was randomly reassigned to this Department.
7 This Court set a Status Check on March 23, 2018, to deal with Metro’s request for an Order
8 Shortening Time, as well as a number of pending issues. At the Status Check, this Court
9 highlighted the glaring issue with the Motion; namely, that Metro offered no new analysis, no
10 change in law, and no new evidence that could not have been provided previously, that would
11 warrant reconsideration. This Court nonetheless afforded Metro a generous opportunity – rather
12 than denying the Motion in the instant, the Court ordered Metro to file a supplemental brief no
13 later than March 30, 2018. This supplement was to include a list of the qualifying public records
14 in its possession, so that this Court could conduct the review that Petitioners have wanted since
15 the earliest days of this litigation. Rather than comply with the Court’s order, Metro opted to file
16 a premature Notice of Appeal, apparently intending to prevent this Court calling them to task for
17 failure to comply with the Court’s order. As seems to be Metro’s design, the Notice of Appeal
18 creates a procedural quagmire that will inevitably require this Court to issue a substantive ruling
19 on the Motion—and that continues to delay resolution and the inevitable production of public
20 records.⁵

21 **III. LEGAL ARGUMENT**

22 **A. No New Evidence Exists That Would Justify Reconsideration**

23 Reconsideration of an order is appropriate under EDCR 2.24 “[o]nly in very rare
24 instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling
25 already reached. . .” *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). A
26 district court may also consider a motion for reconsideration if the prior decision was clearly

27 _____
28 ⁵ As a practical matter, the Nevada Supreme Court is extremely unlikely to take the appeal up
until the pending Motion is final. *See* Nev. R. App. P. 4(a)(6).

1 erroneous. *Masonry and Tile v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489
2 (1997). “A finding is “clearly erroneous” when although there is evidence to support it, the
3 reviewing court on the entire evidence is left with the definite and firm conviction that a mistake
4 has been committed.” *Unionamerica Mortg. And Equity Trust v. McDonald*, 97 Nev. 210, 211-
5 12, 626 P.2d 1272, 1273 (1981) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68
6 S.Ct. 525, 542 (1948)).

7 Metro’s Motion must be denied, as it does not provide any new evidence, does not point
8 to any intervening change in the law, and does not demonstrate why Judge Scotti’s initial rulings
9 were clearly erroneous. Through its failure to comply with this Court’s order and supplement the
10 Motion, Metro has effectively conceded that no new evidence exists.⁶ This Court has already
11 highlighted that the Motion as submitted was severely lacking and did not, on its face, rise to the
12 level of reconsidering the prior orders.

13 **B. Denying The Motion Promotes Judicial Efficiency**

14 Despite the Motion tolling Metro’s time to file a notice of appeal, Metro chose to file its
15 Notice prematurely, rather than file a supplemental brief in this case. This has created an
16 untenable conflict between the Nevada Supreme Court and this Court. Metro appealed the orders
17 as entered on March 2 and March 9, 2018 respectively. This Court cannot grant a
18 reconsideration where the orders at issue have already been appealed. However, if this Court
19 leaves the Motion pending as the appeal proceeds towards the briefing stage, the Nevada
20 Supreme Court is overwhelmingly likely to find that it cannot rule on the premature appeal. The
21 Nevada Rules of Appellate Procedure actually contemplate the Nevada Supreme Court
22 dismissing a premature Notice of Appeal, such as the one in this case. *See Nev. R. App. P.*
23 *4(a)(6)* (“A premature notice of appeal does not divest the district court of jurisdiction. The court
24 may dismiss as premature a notice of appeal filed . . . before entry of the written disposition of
25

26 ⁶ Additionally, Metro’s failure to comply with this Court’s order constitutes a contempt of court.
27 Nev. Rev. Stat. § 22.010 (3) includes “[d]isobedience or resistance to any lawful writ, order, rule,
28 or process issued by the court or judge at chambers.” Though Petitioners do not seek criminal
contempt sanctions against Metro, the Court should use Metro’s contempt of this Court’s
authority as a basis for denying the Motion.

1 the last-remaining timely motion listed in Rule 4(a)(4).”) Rather than allowing this tension to
2 exist, the most efficient option is to deny the Motion, ensuring that the orders remain exactly as
3 entered and appealed.

4 **IV. CONCLUSION**

5 For the reasons argued above, the Court should summarily deny Metro’s Motion for
6 Reconsideration

7 DATED this 4th day of April, 2018.

8
9 By: /s/ Justin A. Shiroff
10 Joel E. Tasca
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I hereby certify that on the 16th day of March 2018, an electronic copy of the ***JOINT OPPOSITION TO MOTION FOR RECONSIDERATION AND STAY PENDING RECONSIDERATION*** was filed and served on the following counsel of record via the Court's electronic service system:

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Attorneys for Las Vegas Review-Journal

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Attorneys for Las Vegas Metropolitan Police Department

/s/ Sarah H. Walton
An Employee of Ballard Spahr LLP

EXHIBIT 4

EXHIBIT 4

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March 14, 2018

Via Electronic mail

Jackie V. Nichols, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
jnichols@maclaw.com

Re: American Broadcasting Companies, Inc. et al. v. LVMPD, et al
Case No. A-17-764030-W

Counsel:

Thank you for speaking with Maggie McLetchie and I over the phone yesterday to discuss the pending document productions. As a follow-up, I wanted to confirm that Ms. McLetchie and I are working on a list that will assist your client in prioritizing which Body Worn Camera footage to examine first for the purposes of producing it to the Petitioners in this action. Again, the more information and detail about the records you and your client provide, the narrower we can make requests and the better we can prioritize the production. Regardless how the fees and issues are ultimately resolved, this will reduce the fees and costs overall and avoid unnecessary work.

In the interim, and pursuant to Judge Scotti's March 9, 2018 Order, Petitioners request that Metro immediately produce the Body Worn Camera footage from 10:00 PM to 11:30 PM, October 1, 2017, from the first officer who entered into Stephen Paddock's hotel suite/room. Given the extremely limited nature of this supplemental guidance concerning the footage Petitioners want released first, Petitioners request that Metro produce this video to us, Petitioners' counsel, for contemporaneous release to the Petitioners, **no later than 12:00 P.M. on March 16, 2018.**

Please feel free to contact me with any questions. Thank you very much.

Sincerely,

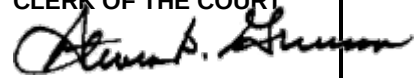


Justin A. Shiroff

JAS/cb
cc: Margaret A. McLetchie, Esq. (via email)

DMEAST #33838080 v1

EXHIBIT I



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

AMERICAN BROADCASTING
COMPANIES, INC.,

Plaintiff,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Defendant.

AND OTHER PARTIES

CASE NO. A-17-764030-W
DEPT NO. XXIII

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

**RE: LVMPD MOTION FOR STAY PENDING RESOLUTION
ON APPEAL ON AN ORDER SHORTENING TIME**

TUESDAY, APRIL 10, 2018

APPEARANCES:

FOR THE PLAINTIFF: JUSTIN A. SHIROFF, ESQ.

FOR LVMPD: JACQUELINE V. NICHOLS, ESQ.

FOR REVIEW-JOURNAL: MARGARET A. MCLECHIE, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

1 **LAS VEGAS, CLARK COUNTY, NEVADA, APRIL 10, 2018, 9:51 A.M.**

2 * * * * *

3 THE COURT: Las Vegas Metro.

4 MS. NICHOLS: Good morning, Your Honor.

5 THE COURT: Hi. Good morning, everybody.

6 MS. MCLEITCHIE: Good morning, Your Honor. Maggie
7 McLetchie for the Las Vegas Review Journal.

8 MR. SHIROFF: Good morning, Your Honor. Justin
9 Shiroff for the remaining petitioners.

10 MS. NICHOLS: And Jackie Nichols on behalf of the Las
11 Vegas Metropolitan Police Department.

12 THE COURT: All right. Hi, everybody. So it looks
13 like Metro has filed a motion to -- they want to obviously
14 withdraw their motion for reconsideration and to request a stay
15 pending the decision by the Nevada Supreme Court.

16 Why do you think a stay should be given here and not
17 in the Supreme Court? As indicated -- as evidenced by the case
18 involving the coroner's report, the Supreme Court has acted
19 quite swiftly in this particular case, plus you all are subject
20 to turning anything over at this time.

21 Rather -- and then your other argument was that a
22 reason for needing a stay is because you'll have to be
23 turned -- you'll have to start turning things over before the
24 pay issue is resolved, but nothing's been resolved.

25 MS. NICHOLS: So, Your Honor, our main concern here

 JD Reporting, Inc.

1 is there is --

2 THE COURT: You have no pending dates to turn
3 anything over as it stands currently.

4 MS. NICHOLS: And so our concern was by withdrawing
5 our motion for reconsideration that you would also withdraw the
6 stay pending that reconsideration, which kind of leaves us in
7 this predicament where if the department does not follow the
8 Court's order immediately producing documents, we're either
9 going to be held in contempt and subject to sanctions, or if we
10 do start producing documents, we essentially waive and
11 undermine our entire appeal arguments.

12 And I think it's also important to recognize, like
13 the coroner's case, there's going to be First Amendment issues
14 if we begin to produce documents because we're not able to
15 retract those documents upon disclosure. And more importantly,
16 we're not able to prohibit them from disseminating any
17 documents on -- once they receive it. And so really the
18 department will be left with no remedy even if we go up on
19 appeal.

20 And let's just say for hypothetical purposes if the
21 Supreme Court does agree with the department in nondisclosure,
22 we've already produced the documents, and so here we are with
23 no remedy even though we produced them because they will not be
24 prohibited from disseminating them. Those are your -- those
25 are our first two factors under the four factor test set out by

1 the Supreme Court.

2 And as far as prejudice to the petitioners, they
3 really rely on the what I'm going to refer to as the five-day
4 rule under the Nevada Public Records Act, which requires the
5 governmental agency to respond to the requester within five
6 days, and that's either by producing the documents, objecting
7 to production, redirecting them. All of that is done in the
8 prelitigation stage.

9 And the Nevada Public Records Act provides a
10 mechanism for them to address that issue. And that issue --
11 and that mechanism is seeking judicial intervention, what they
12 have done here, and the judicial process allows us to seek a
13 stay pending resolution on appeal.

14 And moving to the fourth factor, there are
15 significant legal issues. There's only a handful of cases in
16 Nevada on the NPRA. And one that we feel --

17 THE COURT: There was just one recently released.

18 MS. NICHOLS: There was a March 29th, I believe
19 around there regarding Public Records Act --

20 THE COURT: And they had a lot of language about
21 wanting to be very narrowly construed if there's a non -- an
22 order for nondisclosure of documents.

23 MS. NICHOLS: Correct. And we believe that one of
24 the most important cases is the Donray of Nevada v Bradshaw
25 which established a balancing test absent an unambiguous

1 statute that provides for confidential -- confidentiality under
2 the public records. And that's really what our focus on the
3 appeal is, because we don't believe that Judge Scotti weighed
4 all the interests.

5 And one of those interests as established by Donray
6 is investigative techniques and tactics; that's a significant
7 issue. They did cite that as a public policy regarding
8 nondisclosure, something that needs to be considered, and
9 despite being it in our argument and in the brief and argument,
10 that nothing of that was addressed in Judge Scotti's order.

11 And so really that's an issue of first impression in
12 Nevada on how far investigative tactics and techniques are
13 considered to weight in favor of the governmental interest over
14 public access. And that's all dealing with the first order,
15 which I agree with -- with petitioners and the Court that that
16 issue has to first be handled before we even get to the second
17 issue, but to have an entire record, we are appealing both
18 orders at the same time to have one full record.

19 THE COURT: Both orders being ordered to disclose the
20 documents, and the secondary order is to what was going to be
21 paid?

22 MS. NICHOLS: That's correct, Your Honor.

23 THE COURT: All right. Anything else?

24 MS. NICHOLS: No, Your Honor. Thank you.

25 MS. MCLETHIE: Your Honor, if I may. First of all,

1 just for clarification purposes, I'm not aware that they
2 withdrew the motion for reconsideration. Instead it's my
3 understanding there was a briefing schedule set. We signed a
4 stipulation that was as -- I'm sorry -- a proposed order that
5 was circulated by Metro's counsel, and under that order they
6 were required to supplement that motion for reconsideration.
7 And that supplement was important, Your Honor, because that
8 would've been the first time that they actually provided a log
9 listing the records at issue. They disobeyed that order, did
10 not provide that information and instead filed a notice of
11 appeal.

12 There is currently, until the Court rules on their
13 motion for reconsideration and denies it, which it should do
14 today, there was a stay in place until April 27th. Their
15 decision to abandon the motion for reconsideration, file a
16 notice of appeal caused some procedural confusion that the
17 Court rejecting the motion for reconsideration today can solve.

18 But we're here on an OST on an emergency entirely of
19 their own making because there was a stay in place while the
20 parties were going to further brief the issues raised in their
21 motion for reconsideration.

22 While there's a stay in place and, in fact, to this
23 point, the public is suffering irreparable harm. This case is
24 different from the coroner case that we mentioned earlier --
25 that you mentioned earlier, Your Honor, and that's so for a

1 couple of reasons. First of all, that case was litigated much
2 closer to October 1st. There were narrower categories of
3 records at issue, and in that case the coroner's office, they
4 lost in District Court, but they did articulate specific
5 reasons why categories of documents should be withheld. In
6 this case in --

7 THE COURT: Well, I was just saying that for the fact
8 that they've acted very swiftly on this case in order to get a
9 decision out.

10 MS. MCLEATCHIE: I'm sorry. Who acted very swiftly?

11 THE COURT: Are you talking about -- are you talking
12 about the -- it was Judge Scotti's case as far as the
13 disclosure of that one particular coroner's record. I only
14 referenced that because the Supreme Court was extremely swift
15 in issuing a decision in that case. And they're extremely --
16 they've been very swift in taking action in this case --

17 MS. MCLEATCHIE: That's --

18 THE COURT: -- that's the only reason I indicated.

19 MS. MCLEATCHIE: Understood, Your Honor. That's a
20 little -- that's a little bit of a different procedural
21 posture. And, in fact, sometimes in public records cases
22 unfortunately just due to the caseload at the Nevada Supreme
23 Court it can take years to resolve public records case --

24 THE COURT: So hold on. Do you want the stay to be
25 entered at the District Court level?

1 MS. MCLEATCHIE: No, we do not want the stay to be
2 entered --

3 THE COURT: Because my point was, you know what, the
4 Supreme Court's pretty darn fast in cases that they think a
5 stay needs to be entered. They're pretty darn fast in getting
6 that stay ordered.

7 MS. MCLEATCHIE: Well, I understand -- I understand
8 now, Your Honor.

9 THE COURT: Listen, I'm not understanding your
10 argument because it seems like the way you're arguing that you
11 don't want the stay.

12 MS. MCLEATCHIE: I'm sorry. To clarify, I thought you
13 were talking about the original coroner case involving public
14 records which is a different matter than the Hartfield
15 (phonetic) case. But, no, to be crystal clear, I absolutely
16 agree with the Court that no stay should be entered here.

17 First of all because they can go to the Nevada
18 Supreme Court and request a stay if that's appropriate, if they
19 meet the test. And second of all, because they have not met
20 the test to get this Court to issue them a stay. They filed a
21 cursory motion to stay; it wasn't supported. They seem to
22 believe that they're entitled to a stay as a matter of law to
23 preserve the status quo and that just isn't the case. They do
24 not decide to appeal until they -- the cost order was entered
25 that they don't like.

1 And a lot of their motion to stay is focused on cost,
2 and whether here at the Nevada Supreme Court the cost issue --
3 costs are never irreparable harm. We're talking about money
4 harm, and certainly the interest in them not paying now what
5 they think they are entitled to isn't a reason to slow down
6 production of the records. So if the Court's inclined to deny
7 the stay, we're in complete agreement with that.

8 I would like to address a few points they made about
9 the irreparable harm that they've -- that they would face and
10 compare that to the irreparable harm that the public faces.
11 The public faces irreparable harm because there is a
12 presumption of access, and that's not just with the five-day
13 rule, Your Honor. That is -- that is woven throughout the
14 Public Records Act. It says that access to public records is
15 central to our democratic principles. It -- these are tied to
16 First Amendment issues because the immediate entities have a
17 right to report on this information.

18 Over six months have passed. Public records cases
19 are supposed to be expedited in the District Court, and all
20 public records are in fact supposed to be open to the public
21 for inspection at any time. So the idea that there's nothing
22 immediate other than the fact that the governmental entity is
23 supposed to respond within five days just isn't so. There is
24 grave and irreparable harm for the public and for the
25 petitioners if a stay is granted by this Court.

1 To overcome the presumption in favor of access they
2 mention the Donray case. That case is decades old. And even
3 in that case the Supreme Court ordered disclosure, as it almost
4 always does in cases involving the Public Records Act. Both
5 within the text of the NPRA and in the case law from the Nevada
6 Supreme Court it's very clear that there's a presumption of
7 access that they're required to overcome; they never overcame
8 that presumption. That's what Judge Scotti found.

9 This Court asked them to provide a log that would've
10 specified what responsive records exist that are at issue that
11 they object to producing; they've never done that. Instead,
12 throughout this case they've asserted blanket claims of
13 confidentiality, and seemed to think that the kinds of records
14 that the petitioners are seeking are outside the scope of the
15 NPRA, which is incorrect.

16 And they're unlikely to succeed on the merits because
17 for them to succeed, this is not a novel question. While the
18 specific records at issue are novel, the Public Records Act and
19 the importance of the act is clear -- is clear on its face.
20 They've made no claim of irreparable harm other than just
21 saying disclosure of public records can't be undone, but
22 disclosure of public records in and of itself is not
23 irreparable harm.

24 They haven't explained with specificity the argument
25 that they made today about -- about law enforcement tactics and

1 information. They've never explained with specificity which
2 documents that argument applies to and how. In addition, the
3 Public Records Act also explicitly mandates that rather than
4 just saying, we're not going to give you any records, that a
5 governmental entity even if the claim of confidentiality
6 applies, they have to redact and allow as much access as
7 possible.

8 And so in saying disclosure of these records, and
9 they're talking about every single category of request, Your
10 Honor, they've asked that -- they have not produced one single
11 record in response to any public records request about 1
12 October. And they're now asking this Court, without providing
13 specificity as to each category of record or records being
14 withheld, which they haven't even told us what they are,
15 they're asking this Court as a blanket matter to stay the
16 requirement that they produce it. That does not meet their --
17 their burden to get a stay; it didn't meet their burden under
18 the law.

19 With regard to the burden under the Public Records
20 Act they mentioned Donray. In a few of their briefings they've
21 suggested that we have the burden; that is not the case. The
22 presumption is that the records are public; they haven't
23 overcome that. They can't keep pretending that the Public
24 Records Act doesn't apply to them and then hope that they can
25 get a stay and just delay things further. They haven't

1 articulated any basis to justify their nondisclosure of records
2 or a stay.

3 The idea that they present a substantial legal
4 question on the merits just isn't the case. There's -- the
5 Public Records Act is very clear on its face. The Supreme
6 Court's decisions are very clear. If every time that there's a
7 Public Records Act lawsuit, if they say, this is a new type of
8 record so it's a new question, and so we're automatically
9 entitled to a stay, then every single Public Records Act
10 petition would be appealed and these matters would drag on and
11 on.

12 And while the Nevada Supreme Court, Your Honor, did
13 quickly deal with the Hartfield matter, which was a secondary
14 case involving public records, it dealt relatively quickly with
15 a prior restraint on a petition to the Nevada Supreme Court on
16 an emergency petition. Public records matters are not dealt
17 with on necessarily quickly by the Nevada Supreme Court and can
18 take years. And in order to show that there's a substantial
19 question that justifies a stay, they can't just say there's
20 some legal question here. It has to be a substantial question,
21 and they have to show that the balance of the equities weigh in
22 their favor under Nevada Supreme Court cases about stays that
23 are binding on this Court, and they haven't made that showing,
24 Your Honor.

25 THE COURT: All right. Anything else?

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1 MS. NICHOLS: Just to address a couple of things. As
2 far as our motion for reconsideration, I thought we were clear
3 in our motion for stay. The one that we're addressing today,
4 is that we, in essence, retracted our motion for current
5 reconsideration. However, if the Court would feel more
6 comfortable with us actually moving to withdraw that motion,
7 we're more than happy to do that, but that's where the
8 department stands as far as our motion for reconsideration is
9 concerned.

10 MR. SHIROFF: Your Honor, please forgive the
11 interjection, but on that point, we have filed a limited
12 procedural opposition to the motion for reconsideration being
13 withdrawn. It should be denied outright at this point, because
14 when this Court graciously afforded Metro the opportunity to
15 supplement their brief, and actually give this Court any
16 semblance of evidence upon which it might reconsider either of
17 the orders, it chose not to do so, instead, opting to file a
18 premature notice of appeal. And as we highlighted in that
19 limited opposition, this Court should just deny the motion for
20 reconsideration.

21 MS. NICHOLS: With respect to that, Your Honor, the
22 petitioners continue to accuse that Metro is delaying,
23 delaying, delaying. And at first it was motion for
24 reconsideration here is to delay this process even further. So
25 now the department has completely foregone the motion for

1 reconsideration, has completely skipped that entire process and
2 now has moved to its appeal rights. And that --

3 THE COURT: And so here's the thing, and I think that
4 counsel touched on this very briefly. AS THIS CASE was
5 postured up until you filed the motion, really any urgency that
6 you argue is created by Metro themselves because the bottom
7 line is you've chosen not to exhaust all your remedies down at
8 the District Court. There's been no decision on Judge Scotti's
9 motion for reconsideration that was subject to additional
10 briefing.

11 You -- because there was additional briefing
12 requested on the motion to -- for reconsideration there is no
13 pending order requiring Metro to turn over the documents, or as
14 far as what the cost was going to be for any documents that the
15 plaintiff would have to pay for any documents to be turned
16 over. So basically, any urgency is created by Metro
17 themselves. It's not created by any decisions of this Court
18 because of the way it was postured.

19 MS. NICHOLS: And to that, Your Honor, the order was
20 entered -- the first order was entered March 2nd. The second
21 order was entered March 9th. We filed our motion for
22 reconsideration on the 16th, and actually we tried to submit it
23 earlier, but Scotti did not take it because of the recusal
24 issue which was at the hands of the RJ and not the department
25 so --

1 THE COURT: Okay. So here's reality. So Scotti
2 issued an order ordering the disclosure, correct?

3 MS. NICHOLS: Correct.

4 THE COURT: Scotti also issued an order as far as
5 tentative rulings regarding expenses related to the disclosure.
6 You could have chosen, if you did not want to go through,
7 exhaust your District Court remedies, you could have chosen to
8 take an appeal at that time; you did not. You filed a motion
9 of reconsideration saying, hey, that Metro is going to be
10 harmed if we have to turn over all these documents for a
11 multitude of legal basis; however you gave no specificity.

12 But basically, when you filed that motion for
13 reconsideration, we had the status check. Metro got what it
14 wanted, at least temporarily. They -- there was no -- the
15 Court held in abeyance any pending orders to turn over records.
16 The Court further held in abeyance as far as any monies that
17 would have to be paid by plaintiff to defendant for the turn
18 over of those records.

19 So at this point, now by withdrawing your motion for
20 reconsideration or it being denied -- I haven't decided exactly
21 how I'm going to handle it -- you have created your own
22 urgency. You have created your own exigent circumstances, but
23 they're not created by anything that's happened in the lower
24 court.

25 MS. NICHOLS: And, Your Honor, I'm sorry I would

1 disagree because --

2 THE COURT: You don't even, I mean, you could have
3 gone through the hearing. You had everything in abeyance. You
4 could have gone through the motion for reconsideration. If
5 that had been granted, great, Metro would have prevailed in its
6 position. If it had been denied, you would have had the
7 ability to go up to the Supreme Court. But at this juncture
8 you are creating the emergency, Metro itself is, not the Court
9 or the Court's orders. And I think that's what the plaintiff
10 is trying to touch on.

11 MS. NICHOLS: And I don't think so. And I'm -- and
12 the reason why I don't agree with the Court, respectfully, is
13 because we have moved swiftly, and we do get 30 days to appeal;
14 that's the rule. And there's nothing to say that we must
15 appeal right away --

16 THE COURT: You could have appealed. What you're
17 doing is it seems like there's a lot of gamesmanship, 'cause
18 here's the thing, and as I've indicated, okay, and you laid out
19 the course of this litigation, and I absolutely agree with you.
20 Judge Scotti issued a ruling. He issued a ruling as to money.
21 He issued a ruling as to disclosure; Metro didn't agree with
22 it. Metro could have, as they're doing now, they could have
23 appealed that decision; they chose not to. They filed a motion
24 for reconsideration.

25 What that motion reconsideration gave you, especially

1 because there was a change in department, it gave you more
2 time. Then you got rulings from the -- this Court putting
3 everything in abeyance; that gave you more time. Now, suddenly
4 Metro wants to use the route that was available to it months
5 ago, which is not doing a motion for consideration, not
6 exhausting its remedies in a lower court, but rather appealing
7 Judge Scotti's initial orders.

8 I mean, there's gamesmanship going on here. That's
9 why I keep saying the urgency is created by Metro. It's not
10 created by any decision the Court's making because you're
11 getting what you're wanting. You got a delay after Scotti; you
12 got a delay after the Court set a status check, the motion for
13 reconsideration. You got another delay until there was
14 hearings set on the motion for reconsideration. So you could
15 have done what you're doing now. You could have done it months
16 ago, but all you've done is prolong the proceedings even
17 further than it should have been. And that's what's very
18 concerning to me; it seems like a game.

19 MS. NICHOLS: And I respect Your Honor, but I would
20 disagree --

21 THE COURT: So tell me this, tell me what's changed?
22 I think you're very aware that you could have done the same
23 thing you're seeking to do now, which is you have a right, I
24 absolutely agree with you. You have a right to seek relief in
25 the higher courts. Why couldn't you have done it then? What

1 has changed between when you could have done it months ago and
2 now? Why is there suddenly an urgency?

3 MS. NICHOLS: Your Honor, from the first order of
4 March 2nd we get 10 days to file a motion for reconsideration,
5 and so if we don't want to waive that --

6 THE COURT: I agree with you.

7 MS. NICHOLS: -- we have to file it, which was on the
8 16th --

9 THE COURT: Okay.

10 MS. NICHOLS: -- and we were already in the process
11 of drafting that when Judge Scotti came out with his recusal
12 minute order that Monday. So, I mean, we don't want to sit
13 here --

14 THE COURT: So you opted for one --

15 MS. NICHOLS: -- and waive certain arguments. One of
16 the concerns we had is to ensure that the record was clear.
17 That was one of the --

18 THE COURT: Well, let me put it this way, I agree
19 with you. I agree with you, you have your right to appeal. I
20 agree with you have a right to motion for reconsideration. You
21 chose one of those two options. You chose a motion for
22 reconsideration versus doing the notice of appeal. So it
23 proceeded along that path. You got additional time in order
24 to -- you got additional time whereas you were not obligated to
25 turn over the records. Now, you say, hey, we want to change

1 course. We want to exercise our right to a direct appeal. I
2 agree with you. You have both of those rights available to
3 you.

4 I'm saying you could have exercised either one a
5 while ago and you chose not to. And now, suddenly you're,
6 like, hey, you know what, I don't want to go via motion for
7 reconsideration; I want to exercise my right to a direct
8 appeal. And I see why 'cause you are absolutely right; you are
9 entitled to it. Well, what's changed? Why is there suddenly
10 an urgency now because you've changed the way you want to
11 proceed with this litigation?

12 MS. NICHOLS: Your Honor, we wanted to preserve our
13 right to have the orders reconsidered which is why we filed it
14 10 days after the first order.

15 THE COURT: I agree with you. I'm saying I agree
16 with you on some things.

17 MS. NICHOLS: And that was the whole purpose, was to
18 preserve our right and to ensure that the record is clear.

19 THE COURT: All right. But now you decide you don't
20 want to do that, and you want to do -- go with the course that
21 was available to you back then as well, correct?

22 MS. NICHOLS: We would like to proceed with --

23 THE COURT: 'Cause you -- I agree with you. You had
24 two rights, right of direct appeal, you had a right for a
25 motion for reconsideration, agree with you 100 percent. You

1 chose one of those two things. Now you're deciding you want to
2 choose a different thing. Both of those were available to you
3 months ago. Now you're, like, hey, you know what, I need
4 more -- I don't want to turn anything over. I'm going to
5 exercise -- take this litigation a different path.

6 So is there anything else that you want to say
7 because I'm very frustrated because I think that's gamesmanship
8 that's going on here. All of this could have been done months
9 ago. I mean, it's now months since the shooting occurred, and
10 it's still the same delay, delay, delay. When one technique
11 doesn't work, then you switch to another one, and it's very
12 concerning for the Court.

13 MS. NICHOLS: And I -- again, we're not delaying. I
14 believe that by foregoing our motion for reconsideration that
15 we're actually speeding up this process. I mean, you're
16 saying --

17 THE COURT: You should have sped it up months ago.

18 MS. NICHOLS: -- you're saying months ago, but the
19 order came out the 2nd and then the 9th and then we filed on
20 the 16th of April. That's less -- that's about two and a half
21 weeks ago. That's not months ago. And we have to confer with
22 our client. We can't make unilateral decisions and that's a
23 process. You have to meet and strategize and determine what is
24 best for us, and that is what we have done.

25 THE COURT: Well, nothing has really changed as far

1 as deciding what's best for you. I mean, there's -- this
2 occurred in October. There's been nondisclosure of a record,
3 and it's been the position of Metro, which has been unwavering
4 since October that -- or whenever this litigation was filed, I
5 don't have the exact date, that they're not going to turn over
6 certain records. So really not much has changed over the last
7 many months.

8 MS. NICHOLS: Well, actually, Your Honor, I'd like to
9 point out when initially our petition was filed, there was an
10 ongoing investigation. And then there was the search warrant
11 record case before Judge Cadish, and that dealt with the search
12 warrant affidavit which kind of accidentally leaked the name of
13 someone who was being investigated. And that's kind of where
14 this whole entire case took a different turn because it wasn't
15 any intention of the FBI at that moment to pursue that guy by
16 the end of that Friday. And that was our initial argument in
17 the petition that there was an ongoing investigation. In
18 addition to that though, we also --

19 THE COURT: Let me ask this --

20 MS. NICHOLS: -- articulated that there was
21 investigative techniques and tactics.

22 THE COURT: Stop there. And I won't -- and I want to
23 explore that in a little bit.

24 So this is another thing that's frustrating because
25 you argued basically that the Court disregarded, or it's not a

1 developed area of law as far as the particular privileges that
2 Metro's arguing. However, there's really been no substantive
3 rulings by the Courts on that issue.

4 You know, you're appealing basically the fact that a
5 blanket objection was given, but you've never given the Court
6 the ability to rule on the substance of those objections. And
7 that's all you were given was additional time to say, hey, you
8 keep telling us the law's on your side, just cite the law, just
9 cite the law. And that's the reason I'm asking you this is
10 because it goes into whether you're likely to appeal -- prevail
11 on the appeal.

12 You've never really -- the Court has never really
13 found that the law is against you. The Court has just simply
14 asked for additional information in order to be able to make a
15 good articulate ruling. And that's where it stood between the
16 status check and the date that was going to be set for the
17 hearing on the motion for reconsideration. And it goes into
18 the -- whether you'll prevail on appeal.

19 MS. NICHOLS: And I understand what you're saying.
20 In our petition we did articulate. We even cited to FOIA the
21 Freedom Of Information Act, which, while it doesn't -- it's not
22 identical to the Nevada Public Records Act, the Nevada Supreme
23 Court has relied on FOIA multiple instances. And FOIA
24 specifically creates an exemption, and we cited to a multitude
25 of cases where if there's investigative techniques and tactics

1 at issue --

2 THE COURT: I agree with you to certain documents.
3 It doesn't just say you can claim a blanket privilege. I agree
4 with you on that point, that it does allow for privileges to be
5 asserted. And certainly not everything in the world is subject
6 to disclosure.

7 MS. NICHOLS: No. And I -- and that's what we were
8 articulating in our petition that was never addressed.

9 THE COURT: All right. Is there anything else? And
10 I'm sorry if I grilled you, but, sorry.

11 MS. MCLETCHE: Your Honor, I did want to point out
12 that one thing that they've never done is the log. And the
13 Nevada Supreme Court has made clear that while it's not
14 required in every instance, at least the type of information
15 that would be provided on a log is necessary because the
16 hardest thing I think for petitioners in this case is we're
17 litigating to a certain extent in the dark. We don't know what
18 documents are responsive. We don't know what kind of volume
19 we're talking about.

20 And we have bent over backwards trying to work with
21 them to narrow some initial requests to see if we can get at
22 least some documents produced, and to try to work with them on
23 the cost issue as well. And their claim that there has been no
24 gamesmanship I think would ring less hollow if they had worked
25 with us and let us know when they were changing procedural

1 tacts, for example, and they haven't.

2 And I think all of this stands far afield from the
3 NPRA which explicitly says that courts are supposed to expedite
4 these matters. And I think that Metro as a governmental entity
5 should have been working with us to expedite this matter and
6 handle it efficiently and fully for the Nevada Supreme Court;
7 they failed to do so. And while I agree with the Court and
8 Counsel for Metro that they are entitled to file a motion for
9 reconsideration or file a notice of appeal, not do both and try
10 to waste resources and confuse the Court and waste the time and
11 resources of petitioners.

12 But what they're not entitled to is a stay. And they
13 have not met their burden on a stay. They can't say there's a
14 serious legal question here because we've made an argument that
15 we don't want to hand the documents over. They were required
16 to make that argument timely and specific with regard to
17 specific records at issue, and they were required to explain
18 how redacting certain records would not solve that issue.

19 And again, while they keep hanging their hat today on
20 the -- I think they've admitted that the investigation is
21 closed and that the ongoing investigation argument no longer
22 applies. And if there's no longer an ongoing investigation,
23 then what argument is investigative techniques, it appears
24 today, and they have not made that argument with specificity
25 with regard to what documents at issue as I already mentioned

1 and as the Court mentioned.

2 Instead they've refused to produce anything, anything
3 about 1 October, and that's just not consistent with the NPRA.
4 They're not likely to succeed on the merits because what
5 they're essentially trying to do is get an exemption from the
6 NPRA for Metro, and that's not going to happen, Your Honor.

7 THE COURT: Yes, ma'am.

8 MS. NICHOLS: I don't have anything further, Your
9 Honor.

10 THE COURT: Okay. And I have a feeling I probably
11 tipped my hand a little bit, but, you know, you all are
12 entitled to develop the record on this. I'm going to deny the
13 request for a stay. I believe that if a stay should be issued,
14 it should be done in Nevada Supreme Court at this point. You
15 know, and I asked you guys about a lot of things. As far as
16 this Court's position, it appears to this Court that any
17 urgency as far as a stay being granted was really created by
18 Metro.

19 And as I indicated several times, I agree, Metro has
20 the right to file a motion for reconsideration, or file a
21 notice of direct appeal, and it chose one particular path which
22 was the motion for reconsideration. And as a result of filing
23 that motion for reconsideration as everyone knows there was a
24 status check, and at that point during the status check the
25 Court basically held in abeyance any orders to disclose

1 documents during a certain time frame, and also held in
2 abeyance any matters with respect to cost.

3 And the reason the Court did that, is the Court
4 wanted to make sure it could make a full and very articulate
5 decision based upon the law. And that's what the Court wanted
6 more of was the law. And it asked that Metro provide
7 additional law to the Court, and asked that the plaintiff
8 supplement the law as they deemed appropriate. And that was
9 the reason that we continued on the motion for reconsideration.

10 Now, again, I agree with Metro that they have a right
11 to file a direct appeal, but they've chosen, in the Court's
12 opinion, the decision to file a motion for direct appeal or
13 filed a direct appeal now has basically delayed this even more
14 because quite simply they weren't subject to turning over
15 anything.

16 As far as whether or not they're likely to prevail on
17 the merits of the appeal, the Court at this stage doesn't
18 believe that Metro has made that demonstration, as has been
19 argued at length both at the status check and today. All the
20 Court simply asked was for additional law. And although the
21 Court does agree with Metro in that there are privileges that
22 may protect the disclosure of certain documents, the question
23 has always been for this Court, which documents are subject to
24 protections under the law. And that's never been provided to
25 this Court. All the Court simply asked was a breakdown of what

1 documents and why it would be subject to privilege so the Court
2 could make a decision. And to this date it's never been
3 provided.

4 And if you go back and look at the abundance of case
5 law, both in the State of Nevada and all across the country, as
6 far as documents subject to disclosure pursuant to the Public
7 Records Act, most every Court errs on the side of disclosure
8 except in very limited circumstances. And in fact, the Nevada
9 Supreme Court in a recent decision said, you know, any
10 documents that are not turned over pursuant to Public Records
11 Act, that should be very narrowly construed and articulated as
12 far as the basis why.

13 So the Court thinks that those two factors weigh
14 heavily against Metro's request for a stay. And again, any
15 stay would have to be taken by the Nevada Supreme Court.

16 As far as the motion for reconsideration, the Court's
17 just going to deny that without prejudice. It's without
18 prejudice 'cause the Court has never had an opportunity to get
19 to the merits of the situation. So depending on what happens
20 with the Supreme Court it could be readdressed at that time.

21 Any other dates set for this case will be taken off
22 calendar at this point and wait for remittitur from the Supreme
23 Court. Thank you.

24 MS. NICHOLS: Thank you, Your Honor.

25 THE COURT: I need an order. Plaintiff's prevailing

1 party, plaintiff prepare to be reviewed by defendant.

2 MR. SHIROFF: We'll do so, Your Honor, thank you.

3 MS. MCLEATCHIE: Just for clarity's sake, Your Honor,
4 the Court had previously entered a stay while the briefing on
5 the motion for reconsideration was in place, and so that stay
6 is no longer in place --

7 THE COURT: That's moot. That's moot given the
8 denial of the -- without prejudice of the reconsideration.

9 MS. MCLEATCHIE: Thank you, Your Honor.

10 MR. SHIROFF: Thank you.

11 THE COURT: Thank you.

12 -oOo-

13 ATTEST: I do hereby certify that I have truly and correctly
14 transcribed the audio/video proceedings in the above-entitled
15 case.

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Dana L. Williams
Transcriber

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25

EXHIBIT J

VIA U.S. MAIL AND E-MAIL

April 23, 2018

Nick D. Crosby, Esq. and Jackie V. Nichols, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
Email: ncrosby@maclaw.com; jnicols@maclaw.com

Re: *American Broadcasting Companies, Inc. et al. v. LVMPD* (Case No. A-17-764030-W)

Dear Nick and Jackie:

Should the Nevada Supreme Court deny the emergency motion for stay filed by the Las Vegas Metropolitan Police Department, please immediately produce the specific Body Worn Camera Footage identified in Mr. Shiroff's letter to you dated March 14, 2018. I have attached a copy of that letter for your convenience. The specific footage identified in that letter is:

- footage from 10:00 PM to 11:30 PM, October 1, 2017, from the first officer who entered into Stephen Paddock's hotel suite/room.

If the Supreme Court denies the stay, please produce that video footage contemporaneously to Petitioners' counsel via email immediately (in no more than 8 business hours). In the alternative, please let us know if you need to make other arrangements to get the footage to us expeditiously. As I have made clear, my client is also willing to inspect the Body Worn Cam Footage in person and reserves its rights to do so upon denial of a stay.

As you know, the Las Vegas Review-Journal has joined in the request for Body Worn Cam Footage. (See February 7, 2018 hearing transcript at p. 6:4-6.) To the extent that you do not believe the Review-Journal has perfected a request for the Body Worn Cam Footage sought by the other petitioners in the above-captioned action, please consider this a timely request pursuant to NRS 239.001 et seq. (the "NPRA"). The Review-Journal seeks to either review the footage in person (NRS 289.830(2)(b)) or receive copies (NRS 289.830(2)(a) and NRS 239.010(1)), whichever is most efficient and will enable review as quickly as possible. As we indicated during the one meet and confer the parties conducted about this matter on March 13, 2018, the Review-Journal is also more than willing to work with you and counsel to sequence and narrow any productions, and reduce costs on all sides. However, the Petitioners are not currently able to do so due to the limited information that you and the LVMPD have provided in response to requests and over the course of litigation.

Further, while you have previously initiated at least one "offline" communication with counsel for the other Petitioners, as I have previously pointed out, all the Petitioners are entitled to access to

the records identified in the order requiring disclosure. Further, coordination will reduce the costs and work required by all the parties.

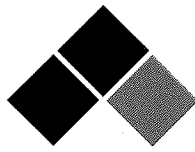
Thank you in advance for your immediate attention to this correspondence and anticipated cooperation should the Nevada Supreme Court deny the stay.

Regards,

A handwritten signature in blue ink, appearing to read 'Margaret A. McLetchie', is written over the printed name. The signature is fluid and stylized, with a large loop at the end.

Margaret A. McLetchie

cc: file; Justin Shiroff and Joel Tasca (both via email only).



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March 14, 2018

Via E-Service

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Re: American Broadcasting Companies, Inc., et al. v. LVMPD et al.
Case No.: A-17-764030-W
Case No.: A-17-764169-W
Our File No. 14687-102

Dear Counsel:

As you know, on March 13, 2018 the parties held a meet and confer conference pursuant to the Court's order at the March 7, 2018 hearing, as well as the March 2, 2018 order, to discuss the rolling disclosure of public records. The following records are not in the legal custody or control of the Las Vegas Metropolitan Police Department ("LVMPD").

Dash Cam. LVMPD officers do not have Dash Cams installed in their vehicles. Thus, LVMPD does not have any documents related to this request.

Evidence Logs. The Federal Bureau of Investigation ("FBI") created and maintains the evidence logs relating to the 1 October incident. This includes any information obtained on the weapons of Steven Paddock.

Emergency Purchase Orders/No-Bid Contracts. LVMPD did not utilize emergency purchase orders or no-bid contracts as a result of the 1 October incident.

Search Warrant Returns/Affidavits of Probable Cause. It is LVMPD's position that this information has already been provided to Petitioners as a result of Judge Cadish's ruling in District Court Case No. A-17-764028-W. Because of this disclosure, the parties have agreed reproduction of these documents are unnecessary. To the extent Petitioners discover additional search warrants, returns, and/or affidavits of probable exist or information contained in the production provided by Judge Cadish is not included, please let us know and we will search for and provide that information.

Joel E. Tasca, Esq.
Justin A. Shiroff, Esq.
Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.
March 14, 2018
Page 2

CCTV Videos. I misspoke on the telephone conference. We have our public CCTV video footage and there is approximately 390 hours total.

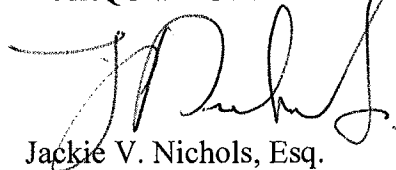
With respect to "interview reports" requested by Petitioner CNN, LVMPD interprets this to mean witness statements and incident reports provided by victims. Please let us know if there are any additional reports CNN intended to encompass under interview reports.

During the conference, we also discussed the significant amount of data these requests encompass. LVMPD estimates that data equates to tens of Terabytes in total, in the actual number is yet to be determined. As we discussed, this includes approximately 750 hours of body cam footage and 2,000 911 calls,. This data is located on multiple electronic systems within LVMPD. In essence, LVMPD will need to first transfer all of this information on a separate server to begin reviewing and analyzing these documents for redaction purposes prior to disclosure. Likewise, this information will most likely need to be transferred to an outside server for production purposes.

Of course, as I continue to receive information and updates, I will keep Petitioners informed of the same. In the meantime, if you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

MARQUIS AURBACH COFFING

A handwritten signature in black ink, appearing to read "Jackie V. Nichols".

Jackie V. Nichols, Esq.

JVN:kb